Supreme Court, U. S.
FILED
SEP 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents
On Behalf of the
AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI
8011 Clayton Road
St. Louis, Missouri 63117
(314) 721-1215

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
References to Reported Opinions Below	1
The Constitutional Provisions Involved	3
The Questions Presented for Review	4
A Statement of the Case	4
A. Chronology of Pleadings	4
B. Chronology of Facts	6
Summary of Argument	11
Introduction	11
Point 1—The Merits	11
Point 2—The Attorneys' Fees	12
Point 3—Respondents' Standing	12
Argument	13
I. Introduction	13
II. Point 1—The Merits	17
A. The Staffing Policy Was Clearly Within the Scope of Respondents' Pleadings	17
B. Case Law Precedents for Respondents' Position	21
C. The Fashioning of Appropriate Relief	28
D. Petitioners' Unmet Burden of Compelling Interests	31
E. Petitioners' Defense of Public Institutional "Conscience"	34
F. Abortion as a Legislatively Non-Favored Choice	36

G. The Imposition of an Unconstitutional Condition 43
H. The Socio-Economic Discrimination 45
I. Petitioners' Lament 54
III. Point 2—Respondents' Attorney Fees 55
IV. Point 3—The Standing of Respondents 58
Conclusion 66
Certificate of Service 67

TABLE OF CITATIONS

Cases

Abele, *et al.* v. Markle, *et al.*, 452 F.2d 1121 (2nd Cir. 1971) 61
Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975) 13
Boddie, *et al.* v. Connecticut, *et al.*, 401 U.S. 371 (1971) 51
Brandenburger, *et al.* v. Thompson, *etc.*, 494 F.2d 885 (9th Cir. 1974) 58
Bullock, *et al.* v. Carter, *et al.*, 405 U.S. 134 (1972)..... 50
The California Bankers Association v. Schultz, *etc.*, *et al.*, 416 U.S. 21 (1974) 32
Coe, *et al.* v. Hooker, *et al.*, 406 F.Supp. 1072 (D.N.H. 1976) 37, 42
Crossen, *et al.* v. Attorney General of the Commonwealth of Kentucky, 344 F.Supp. 587 (E.D.Ky. 1972), vacated and remanded, 410 U.S. 950 (1973) 62
Crossen, *et al.* v. Breckenridge, *et al.*, 446 F.2d 833 (6th Cir. 1971) 61, 62

Doe v. Charleston Area Medical Center, Inc., *et al.*, 529 F.2d 638 (4th Cir. 1975) 37, 41
Doe v. Mundy, *et al.*, 514 F.2d 1179 (7th Cir. 1975) 28, 34, 38, 65
Doe v. Rampton, *etc.*, *et al.*, 366 F.Supp. 189 (D.Utah 1973) 37
Doe, *et al.* v. Bolton, *etc.*, *et al.*, 319 F.Supp. 1048 (N.D. Ga. 1970), affirmed, 410 U.S. 179 (1973) ..... *passim*
Doe, *et al.* v. General Hospital of the District of Columbia, *et al.*, 313 F.Supp. 1170 (D.D.C. 1970), remanded, 434 F.2d 423 (D.C.C. 1970) and remanded, 434 F.2d 427 (D.C.C. 1970) 26
Doe, *et al.* v. Hale Hospital, *et al.*, 500 F.2d 144 (1st Cir. 1974), cert. denied, 420 U.S. 907 (1975) 28, 32, 37
Doe, *et al.* v. Israel, *etc.*, 482 F.2d 156 (1st Cir. 1973), cert. denied, 416 U.S. 993 (1974) 63
Doe, *et al.* v. Myatt, *et al.*, —F.Supp. — (D.N.D. 1975).. 37
Doe v. Poelker, *etc.*, *et al.*, 497 F.2d 1063 (8th Cir. 1974) 2, 5, 57, 65
Doe, *et al.* v. Poelker, *etc.*, *et al.*, 515 F.2d 541 (8th Cir. 1975) 2, 5, 18, 20, 28, 35, 53, 55, 57, 58, 65
Doe, *et al.* v. Poelker, *etc.*, *et al.*, 527 F.2d 605 (8th Cir. 1976) 2, 6, 65
Doe, *et al.* v. Rose, *etc.*, 380 F.Supp. 779 (D.Utah 1973), affirmed, 499 F.2d 1112 (10th Cir. 1974) 37
Doe, *et al.* v. Scott, *etc.*, *et al.*, 321 F.Supp. 1385 (N.D. Ill. 1971), vacated and remanded *sub nom.* Hanrahan, *etc.* v. Doe, *et al.*, 410 U.S. 950 (1973) 60
Doe, *et al.* v. Westby, *et al.*, 402 F.Supp. 140 (D.S.D. 1975) 37
Doe, *et al.* v. Wohlgemuth, *et al.*, 376 F.Supp. 173 (W.D. Penn. 1974), affirmed on other grounds *sub nom.* Doe, *et al.* v. Beal, *etc.*, *et al.*, 523 F.2d 611 (3rd Cir. 1975) 37
Doe, *etc.* v. Ceci, *etc.*, 517 F.2d 1203 (7th Cir. 1975)..28, 38

Douglas, *et al.* v. California, 372 U.S. 353 (1963) 49, 50

Earley, *et al.* v. Di Censo, *et al.*, 403 U.S. 602 (1971) ... 38
Edwards v. California, 314 U.S. 160 (1941) 48
Eisenstadt, *etc.* v. Baird, 405 U.S. 438 (1972) 24, 37, 39
Elrod, *etc.*, *et al.* v. Burns, *et al.*, — U.S. — (1976) 33

Fairley, *et al.*, *etc.* v. Patterson, *etc.*, *et al.*, 493 F.2d 598 (5th Cir. 1974) 58
Franks, *et al.* v. Bowman Transportation Company, Inc., *et al.*, — U.S. — (1976) 65
Friendship Medical Center, Ltd., *et al.* v. The Chicago Board of Health, *et al.*, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975) 37

Graham, *etc.* v. Richardson, *et al.*, 403 U.S. 365 (1971).. 53
Griffin, *et al.* v. Illinois, 351 U.S. 12 (1956) 48,50
Griswold, *et al.* v. Connecticut, 381 U.S. 479 (1965) 24, 39, 50, 51, 53

Hairston v. R & R Apartments, *et al.*, 510 F.2d 1090 (7th Cir. 1975) 58
Harper, *et al.* v. Virginia Board of Elections, *et al.*, 383 U.S. 663 (1966) 49, 50
Hathaway v. Worcester City Hospital, *et al.*, 475 F.2d 701 (1st Cir. 1973), stay denied, 411 U.S. 929 (1973) 25, 32

James, *etc.*, *et al.* v. Strange, 407 U.S. 128 (1972) 53

Klein, *et al.* v. Nassau County Medical Center, *et al.*, 347 F.Supp. 496 (E.D.N.Y. 1972), vacated and remanded *sub nom.* Ryan, *etc.* v. Klein, *et al.*, 412 U.S. 924 (1973), affirmed, 409 F.Supp. 731 (E.D.N.Y. 1976)..37, 38, 41, 60

Lindsey, *et al.* v. Normet, *et al.*, 405 U.S. 56 (1972) 52
Loving, *et ux.* v. Virginia, 388 U.S. 1 (1967) 51

Lubin v. Panish, *etc.*, 415 U.S. 709 (1974) 50

Matthews, *etc.* v. Eldridge, 424 U.S. 319 (1976) 31
McCabe v. Nassau County Medical Center, *et al.*, 453 F. 2d 698 (2nd Cir. 1971) 26
Meek, *et al.* v. Pittenger, *etc.*, *et al.*, 421 U.S. 349 (1975) 38
Memorial Hospital, *et al.* v. Maricopa County, *et al.*, 415 U.S. 250 (1974) 29, 32, 43
Meyer v. State of Nebraska, 262 U.S. 390 (1923) 39
Missouri *ex rel.* Gaines v. Canada, *etc.*, 305 U.S. 337 (1938) 44
The Moore Company of Sikeston, Missouri, *et al.* v. Sid Richardson Carbon & Gasoline Company, 347 F.2d 921 (8th Cir. 1965) 64

Nelson, *et al.* v. Heyne, *et al.*, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974) 29
Newman, *et al.* v. State of Alabama, *et al.*, 349 F.Supp. 278 (M.D.Ala. 1972) 29
Nyberg, *et al.* v. The City of Virginia, *et al.*, 495 F.2d 1342 (8th Cir. 1974), appeal dismissed for want of jurisdiction, 419 U.S. 891 (1974) 26, 28, 30, 32, 37

O'Connor v. Donaldson, 422 U.S. 563 (1975) 29, 32
Orr, *et al.* v. Koefoot, *et al.*, 377 F.Supp. 673 (D.Neb. 1974) 28, 38

Paris Adult Theatre I, *et al.* v. Slayton, *etc.*, *et al.*, 413 U.S. 49 (1973) 32
Pierce, *etc.*, *et al.* v. Society of Sisters, 268 U.S. 510 (1925) 39
Planned Parenthood Association, *et al.* v. Fitzpatrick, *et al.*, 401 F.Supp. 554 (E.D.Pa 1975), vacated and remanded on other grounds, — U.S. — (1976) 37
Planned Parenthood of Central Missouri, *etc.*, *et al.* v. Danforth, *etc.*, *et al.*, — U.S. — (1976) 24, 65

Poe, *et al.* v. Menghini, *et al.*, 339 F.Supp. 986 (D. Kan. 1972) 60

Richardson, *etc.* v. Perales, 402 U.S. 389 (1971) 31

Roe v. Arizona Board of Regents, *et al.*, — Ariz. — (1976), 549 P.2d 150 .....28, 38

Roe, *et al.* v. Norton, *etc.*, *et al.*, 408 F.Supp. 660 (D. Conn. 1975) 42, 44

Roe, *et al.* v. Wade, *etc.*, 314 F.Supp. 1217 (N.D. Tex. 1970), affirmed, 410 U.S. 113 (1973) .....*passim*

Santiago v. Colon, *et al.*, (Unreported, D.P.R., No. 74-362, Aug. 6, 1974) 28, 37

Sherbert v. Verner, *et al.*, *etc.*, *et al.*, 374 U.S. 398 (1963) 44

Skinner v. Oklahoma *ex rel.* Williamson, *etc.*, 316 U.S. 535 (1942) 39

Sloan, *etc.*, *et al.* v. Lemon, *et al.*, 413 U.S. 825 (1973)... 38

Speiser v. Randall, *etc.*, 357 U.S. 513 (1958) 44

Tilton, *et al.* v. Richardson, *etc.*, *et al.*, 403 U.S. 672 (1971) 38

Union Pacific Railway Company v. Botsford, 141 U.S. 250 (1891) 31

United States v. Vuitch, 305 F.Supp. 1032 (D.D.C. 1969), reversed on other grounds, 402 U.S. 62 (1971) 52, 53

United States v. Wahl, *et al.*, 406 F.Supp. 1396 (E.D.Mich. 1976) 64

United States Department of Agriculture, *et al.* v. Moreno, *et al.*, 413 U.S. 528 (1973) 40

Welsh, *et al.* v. Likins, *et al.*, 373 F.Supp. 487(D. Minn. 1974) 29

Wolfe, *et al.* v. Schroering, *etc.*, *et al.*, — F.2d — (6th Cir. 1976) 36

Wulff, *et al.* v. Singleton, *etc.*, 508 F.2d 1211 (1974), reversed and remanded on other grounds, — U.S. — (1976) 37, 38

Wyatt, *et al.* v. Stickney, *etc.*, *et al.*, 344 F.Supp. 373 (M.D. Ala. 1972) 29

Statutes and Rules

MO. REV. STAT., Section 197.032 .....34, 36

28 U.S.C., Section 2281 36

Federal Rule of Civil Procedure No. 3 64

Federal Rule of Civil Procedure No. 8(f) 19

Other Authorities

Ambrose, *The Milwaukee Story: A Public Hospital's Resistance to the Supreme Court's Abortion Rulings*, 4 FAM. PLAN/POP. REPORTER 68 (1975) 28

Carter, *et al.*, *Genetic Clinic A Follow-Up*, 1 THE LANCET 281 (1971) 16

Center for Disease Control: Abortion Surveillance: 1974, U.S.DEPT.H.E.W. (1976) 13, 43

Child, *Surgical Intervention*, LIFE AND DEATH AND MEDICINE, W.H.Freeman and Company, San Francisco: 1973 16

Cox, *THE SUPREME COURT 1965 TERM, Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV.L.REV. 91 (1966) 50

Developments in the Law Equal Protection, 82 HARV. L.REV. 1065 (1969) 51

Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV.L.REV. 435 (1967) .. 51

Faculty Manual of St. Louis University, Revised September 1968 9

Gelinas, "Roe *v.* Wade *and* Doe *v.* Bolton: *The Compelling State Interest Test in Substantive Due Process*," 30 WASH & LEE L.REV. 628 (1973) 32

Gold, *et al.*, *Therapeutic Abortions in New York City: A 20-Year Review*, 55 AM.J.PUB.HEALTH 964 (1965) 45, 46

Goldberg, *Equality and Governmental Action*, 39 N.Y. U.L.REV. 205 (1964) 51

Goldstein, *et al.*, *Trends in Therapeutic Abortion in San Francisco*, 62 AM.J.PUB.HEALTH 695 (1972) 15

Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 AM.J.OBSTET. AND GYNECOL. 518 (1965) 46

Induced Abortion: 1975 Factbook, REPORTS ON POPULATION/FAMILY PLANNING, Population Council, New York: December 1975 43

International Inventory of Information on Induced Abortion, INTERNATIONAL INSTITUTE FOR THE STUDY OF HUMAN REPRODUCTION, Columbia University, New York: 1974 14

Legalized Abortion and the Public Health, INSTITUTE OF MEDICINE: NATIONAL ACADEMY OF SCIENCES, Washington, D.C.: 1975 .....14, 15

Michelman, THE SUPREME COURT 1968 TERM Forward: *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV.L.REV. 7 (1969) 51

Osofsky, *et al.*, *The Abortion Experience*, Harper and Row, Hagerstown, Md.: 1973 15

Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions:

United States, Each State and Metropolitan Area, THE ALAN GUTTMACHER INSTITUTE, New York: 1975 .....47, 54

St. Louis *Post Dispatch*, June 10, 1975 48

Seward, *et al.*, *The Effect of Legal Abortion on the Rate of Septic Abortion at a Large County Hospital*, 115 AM.J.OBSTET. AND GYNECOL. 335 (1973) 15

Sklar, *et al.*, *Teenage Family Formation in Postwar America*, 6 FAM.PLAN.PERSP. 80 (1974) 16

Stewart, *et al.*, *Therapeutic Abortion in California: Effects on Septic Abortion and Maternal Mortality*, 37 J. OBSTET. AND GYNECOL. 510 (1971) 15

Tietze, *Therapeutic Abortions in the United States*, 101 AM.J.OBSTET. AND GYNECOL. 784 (1968) 46

Vital Statistics of the United States (1973), U.S.DEPT. H.E.W. 15, 43

Weinstock, *et al.*, *Legal Abortions in the United States Since the 1973 Supreme Court Decisions*, 7 FAM. PLAN.PERSP. 23 (1975) 14

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS

REFERENCES TO REPORTED OPINIONS BELOW

Since its inception on August 17, 1973, four District Court and three Appellate Court opinions have been rendered to date in this cause.

1. The first opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, in *Doe*, et al. v. *Poelker*, etc., et al., in Cause No. 73C565(A), dated March 22, 1974, is unreported. It is reprinted in full in Petitioners'

"Petition for a Writ of Certiorari" (Pet. W.C.) at A-1 through A-10.

2. The District Court's first opinion, referred to in above paragraph 1, was reversed and remanded by the United States Court of Appeals for the Eighth Circuit on June 4, 1974 and the same is reported at 497 F.2d 1063 (8th Cir. 1974).

3. The District Court's second opinion in this cause, dated January 13, 1975, is unreported. It is reprinted in full in Pet. W.C. at A-19 through A-26.

4. The District Court's second opinion, referred to in above paragraph 3, was reversed and remanded by the Appellate Court on April 14, 1975, as modified on May 7, 1975 and on June 2, 1975. The opinion is reported at 515 F.2d 541 (8th Cir. 1975). The opinions of April 14, 1975 and May 7, 1975 are reprinted in full in Pet. W.C. at A-40 through A-42 and at A-44 through A-53, respectively.

5. The District Court's third opinion in this cause, dated August 8, 1975, is unreported. It is reprinted in full in Pet. W.C. at A-55 through A-59.

6. The District Court's third opinion, referred to in above paragraph 5, was reversed by the Appellate Court on January 5, 1976 and the same is reported at 527 F.2d 605 (8th Cir. 1976).

7. The District Court's fourth opinion in this cause, dated January 27, 1976, is unreported and has not been reprinted. This opinion is a *per curiam* order, complying with the Appellate Court's opinion referred to in above paragraph 6.

THE CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ninth Amendment to the Constitution of the United States:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellate Court Correctly and Properly Decide That Petitioners' Policies Violated the Standards of Equal Protection, as Constitutionally Afforded to Respondents?

2. Did the Appellate Court Correctly and Properly Award to Respondents Their Attorneys' Fees on the Basis of Petitioner Poelker's "Bad Faith"?

3. Did the Appellate Court Correctly and Properly Decide That Respondent Doe Had Standing on Her Own Behalf and on Behalf of Her Class?

A STATEMENT OF THE CASE

A. **Chronology of pleadings.**

On August 17, 1973 Respondents filed in said cause No. 73C565(A) their "Complaint for Declaratory Judgment and Injunctive Relief", seeking to obtain the free and ready availability of abortions within the confines of the St. Louis City public hospitals for women eligible for medical treatment there.

On March 22, 1974 the District Court entered its "Memorandum and Order" dismissing said cause for lack of Respondents' standing necessary to pursue the same, as a direct result of Respondent Doe then no longer being pregnant. "Notice of Appeal" to the Eighth Circuit was duly filed by Respondents on March 26, 1974 and the matter briefed and orally argued by both parties. On June 4, 1974 Respondents were held to have standing and this cause was "reverse(d) and remand(ed) to the district court for further proceedings consistent with the views expressed in this opinion and in our opinion in Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974)." *Doe* v. *Poelker*, etc., et al., 497 F.2d 1063, 1067 (8th Cir. 1974). Rehearing *en banc* was denied on June 27, 1974 and a request for stay, identified as cause no. A-1320, was denied by this Honorable Court on July 18, 1974.

On remand, a trial was held on November 25, 1974 and on January 13, 1975 the District Court entered its "Order" and "Memorandum and Order" dismissing said cause with prejudice. "Notice of Appeal" to the Eighth Circuit again was duly filed by Respondents on January 20, 1975. On April 14, 1975 this cause was reversed upon the merits. The policies of Petitioners, as to a blanket prohibition against abortions and as to the staffing procedures of the city hospitals, were both declared unconstitutional. *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541, 546 (8th Cir. 1975). Rehearings *en banc* sought by Petitioners were denied on May 7, 1975 and again on June 14, 1975. A request by Petitioners for a stay was denied by the Honorable Harry A. Blackmun on August 5, 1975 and a similar request by Petitioners for a stay was denied by the Honorable Lewis F. Powell, Jr. on August 26, 1975. Upon remand for award of attorneys' fees, trial was held on August 1, 1975 and the District Court entered its "Memorandum and Order" on August 8, 1975, refusing to award any fees. "Notice of Appeal" to the Eighth Circuit again was duly filed by Respondents on August 14, 1975. On January 5, 1976, the District Court was again reversed and

judgment entered for Respondents as to attorneys' fees. *Doe*, et al. v. *Poelker*, etc., et al., 527 F.2d 605 (8th Cir. 1976).

Petitioners' petition for a writ of certiorari was docketed on September 20, 1975 and review granted by this Honorable Court on July 6, 1976.

B. **Chronology of facts.**

On the day of filing her complaint, Respondent Doe was a resident of St. Louis, Missouri, and twenty-six years of age. She had two children at that time, a daughter seven years of age and a son nine years of age. (R. 62). She had no medical insurance coverage (R. 62-63) and held a city hospital clinic card. (R. 65). Additionally, she had experienced five prior miscarriages. (R. 63; Pls. Ex. 2, R. 37, 82).

Prior to August 7, 1973, her husband had been arrested and charged with a crime. (R. 63). She separated from her husband on or about February 1, 1974, almost ten months before the trial in this case. (R. 62).

Jane Doe suspected she was again pregnant in late July of 1973 because of a missed menses. (R. 64). She first visited the gynecological clinic of City Hospital on August 7, 1973. (R. 65). Although she could not recall the name of the "physician" whom she saw (R. 66), she specifically requested an abortion be performed at the city hospital. (R. 65-66). She was informed that an abortion was not possible because it was contrary to hospital policy. (R. 67). The "physician" referred her instead to the obstetrical clinic at city hospital and an appointment for August 13, 1973 was made. (R. 67).

The "physician" on this first visit of August 7, 1973, was Stephen Pandol, then a third year medical student at St. Louis University. (R. 83). His testimony does not contradict that of

Jane Doe and he stated that he had no recollection whatsoever of their conversation, other than as contained in the medical record itself (Pls. Ex. 2, R. 37, 82). (R. 88-89).

Jane Doe appeared at the appointment made for August 13, 1973, at the obstetrical clinic of City Hospital (R. 67) and spoke with Gregory Totel, then a third year medical student at St. Louis University. (R. 90). Mr. Totel informed Jane Doe of the positive results of her pregnancy tests (R. 93-94) and she requested an abortion at City Hospital. (R. 94). He found no medical indications for an abortion (R. 91) and such reasons, if existent, would have been "severe diabetes, a patient with a severe heart condition, something of that type." (R. 95). Mr. Totel indicated he had "personal convictions against the performance of abortions." (R. 95). He knew of no one at City Hospital to whom to refer Jane Doe,

> "(s)imply because all the people on our service for one reason or another did not engage in abortions . . . [for either] (p)ersonal or religious [reasons]." (Bracketed material supplied). (R. 97). (See, also, Pls. Ex. 2, R. 37, 82).

On August 14, 1973, Jane Doe returned to the hospital and spoke on that occasion with Dr. William J. Ott, from whom she again requested an abortion. (R. 68). Dr. Ott was then serving as chief resident from St. Louis University to the obstetrical service at City Hospital. (R. 99-100). Dr. Ott, because of his personal beliefs against abortion, even refused to provide her with a written statement as to the fact or stage of her pregnancy (R. 102), although Jane Doe stated to him her desire for an abortion. (R. 104). Dr. Ott further stated that he had received similar requests from patients desiring abortions at City Hospital and his response to such patients had always been the same. (R. 105-106). Dr. Ott referred Respondent Doe to Dr. Ziad Abu Dalu. (R. 102). Dr. Ott's medical opinion was that Jane Doe evidenced "no medical indications for termination of pregnancy" (R. 104); but as he stated, "as the professional the-

ories and education applied to me there are no indications for termination of pregnancy." (R. 109).

The last physician seen by Jane Doe was Dr. Ziad Abu Dalu, the physician to whom Dr. Ott referred her. (R. 69). She told Dr. Abu Dalu she desired an abortion at City Hospital and he responded it could not be done there. (R. 69, 112, 113). Dr. Abu Dalu saw Jane Doe again on August 15, 1973 and basically the conversation of the prior day was repeated. (R. 71, 72).

Dr. Abu Dalu found no "medical reasons" to justify an abortion for this patient (R. 113) and such reasons would be "(s)evere sickness of the patient, severe debilitating diseases that might affect the mother's health or jeopardize her life." (R. 120). He further did not refer her to another physician for the abortion "(b)ecause I wouldn't discuss it with any other physician. It's a matter of belief and a privacy between a doctor and a patient and I wouldn't push it to any other physician. It's unethical." (R. 120-121). Dr. Abu Dalu admitted he would refer any other "medical or surgical procedures" which he was "unable or unwilling to perform" to another physician. (R. 122-123).

Jane Doe was aborted by a licensed physician on August 22, 1973 at the facilities of Reproductive Health Services, a private medical clinic. (R. 74, 78, 80-81; Pls. Ex. 4, R. 79, 82).

There was vague testimony during trial about an additional obstetrical-gynecological service at City Hospital operated by Washington University Medical School, although this is directly contrary to Petitioner Wochner's statement that the service is staffed exclusively by St. Louis University. (R. 33). Dr. Frank Ostapowicz, Section Head of the Obstetrics and Gynecological Service at St. Louis University, referred to the same as existing "maybe in name only." (R. 41). Mr. Totel referred to the "theoretical existence" of another staffed service (R. 97), but knew of no physicians associated with the Washington University service. (R. 98). In the nine months of service spent by Dr.

Abu Dalu practicing in the obstetrical-gynecological department of City Hospital, he saw only physicians "known to (him) to be associated with St. Louis University." (Parenthetical material supplied). (R. 124). Lastly, Dr. Ott testified that all medical students at City Hospital Ob-Gyn Clinic are students at St. Louis University. (R. 107).

Respondent Doe's medical record indicates confirmed cervical fibroid tumors, polyps, vaginitis, erythema, trichomycosis and an extremely retroverted uterus. (Pls. Ex. 2, R. 37, 82).

Reverend Robert Brungs, S.J., a Jesuit priest and teacher at St. Louis University identified "plaintiffs' exhibit no. 3" as the existing "Faculty Manual of St. Louis University" (Revised September 1968). The exhibit provides on page 34 as follows,

> "(3) Causes of Termination of Tenured Appointment or of Non-Tenured Contracts During the Contract Period
>
> The University may institute procedures for the termination of tenured appointments or current contracts on the basis of the following causes:
>
> . . .
>
> (e) A grave offense in the discharge of University responsibilities, which is clearly against well-established principles of Catholic morality.[14]

[14] It should be noted that the offense must be committed during the discharge of University responsibilities. There is no reference here to the private and personal life of the faculty member. Examples of a grave offense committed in the discharge of University responsibilities would be the encouragement of sexual license in a student organization by its faculty moderator or the performance before students by a member of the Medical Faculty of an operation that, by Catholic standards, is clearly and gravely immoral." (Pls. Ex. 3, R. 55, 82).

Reverend Brungs testified that "By Catholic standards . . . the performance of an abortion before students by a member of the medical faculty (is) a clearly and gravely immoral act". (R. 58,

59). Dr. Ostapowicz similarly testified (R. 52) and indicated the Faculty Manual's application to the medical school faculty. (R. 50). "St. Louis University is a Jesuit institution" (R. 54); and as the District Court noted, "(i)t's certainly admitted St. Louis University is a Catholic institution" (R. 34) and "those people out there morally are not going to do it and won't do it." (R. 52).

Petitioner Poelker, Mayor of the City of St Louis, testified that Petitioner Wochner served as his appointee. (R. 3). Prior to and since April 5, 1973, Petitioner Poelker, through Petitioner Wochner, had enforced the policy that no abortions be performed within the city public hospitals unless "the life of the mother is in danger". (R. 6). The only stated reason for adoption of the policy by Petitioner Poelker was "my own personal conviction that abortion is murder". (R. 10). Both Petitioners Poelker and Wochner testified that the policy was enforced despite the fact that no investigations, studies or surveys were ever made in regard to: the possibility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle City Hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). But for the directions of Petitioner Poelker, Petitioner Wochner, Director of Health and Hospitals for the City of St. Louis and Acting Hospital Commissioner for the City of St. Louis (R. 19, 22-23) would have provided abortions within the public hospital facilities. (R. 31).

The public hospital facilities did and do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Finally, Petitioner Wochner testified that not a single abortion had "been performed at the St. Louis public hospitals since January 1, of 1973 to date" (November 25, 1974). (R. 31).

SUMMARY OF ARGUMENT

Introduction

This Honorable Court's decisions in *Roe*, *infra*, and *Doe*, *infra*, were a medical blessing to women. Morbidity and mortality rates dropped significantly. Unfortunately indigent women have yet to share the benefits enjoyed by women of means. The denial of public hospital facilities for the performance of abortions has prevented indigent women from receiving from their primary and customary source of medical services the medical assistance which they desire and to which they are entitled.

Point 1

Both the arbitrary policy of Petitioner Poelker and the staffing policy of the public hospitals were within the scope of the pleadings, evidence and the courts' decisions. An unanimous line of public hospital and analogous medicaid cases have held the arbitrary exclusion of abortion from the full range of medical services provided, violates the equal protection clause. The state is not free to favor childbirth over abortion without the burden of showing a compelling state interest as justification.

The impact of such policies upon the public falls disproportionately upon the poor and engenders a second line of equal protection violation. Petitioners' policies are not protected by a state statute purporting to authorize public institutions to have a "conscience" policy against abortion. Nor may the state condition the receipt of medical service upon the surrendering of the fundamental choice to terminate pregnancy.

Point 2

The Appellate Court upon the basis of the record, Petitioners' voluminous pleadings and the uncontroverted trial testimony was in a position from the record before it to assess attorneys' fees against Petitioner Poelker on the basis of his "bad faith." The standard for review of such award is whether or not the Court of Appeals has abused its discretion. Clearly, it has not.

Petitioner Poelker throughout the course of this litigation has never once sought to justify his actions and admittedly acted out of an arbitrary, personal motivation. Petitioners' course of conduct before the courts is well documented and supports the award made.

Point 3

Respondent Doe both individually and on behalf of her class has adequate standing to maintain this action. Respondent's pregnancy at the time of filing her Complaint is the standard and her subsequent abortion prior to trial does not moot this action on her behalf nor on behalf of the class. The class nature of this action was recognized by the Court of Appeals during each of the three appeals taken during the course of the litigation. Numerous cases, including *Roe, infra,* and *Doe, infra,* hold that only pregnancy at commencement of suit is necessary and no cases exist to the contrary.

ARGUMENT

I. Introduction.

The plethora of medical and demographic benefits to women seeking abortions, since the availability of legal, medically performed services on a large scale post-*Roe* and *Doe*[1], have inured mainly to women of economic means. The central issue of this case involves the availability of public, government-funded hospitals as resources for abortion services to those women of limited means, who have always been by necessity the principal utilizers of such facilities. The policies of Petitioners in St. Louis, Missouri are repeated in other cities throughout this country and serve as the major encumbrance to women of the full exercise of this Honorable Court's rulings in *Roe, supra,* and *Doe, supra.*

The demographic and medical statistics of abortion have changed drastically since January 22, 1973. Abortion data is now "factual material of clear 'public interest' ".[2]

In 1972, a total of 586,760 legal abortions were reported to the federal Center for Disease Control, a total of 615,831 were similarly reported for the year 1973 and a total of 763,476 for the year 1974.[3] It is generally conceded that the Center for Disease Control count is low because many procedures go unreported, inasmuch as such reporting is not mandatory. A more accurate and comprehensive count, although again based only on procedures voluntarily reported by cooperating facilities, in-

---

[1] *Roe,* et al. v. *Wade,* etc., 410 U.S. 113 (1973). *Doe,* et al. v. *Bolton,* etc., et al., 410 U.S. 179 (1973).

[2] *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809, 822 (1975).

[3] *Center for Disease Control: Abortion Surveillance: 1974,* U.S. DEPT. H.E.W. (1976), at 14.

dicates 745,400 procedures for 1973 and approximately 900,000 for 1974.[4] The actual count for 1975 can safely be assumed to have exceeded 1,000,000 procedures.

Currently out of every 100 procedures in the United States: 1.5 patients were less than 15 years of age; 30.2 were between 15 and 19 years; 30.8 were between 20 and 24 years; 17.1 were between 25 and 29 years; and 17 were over 30 years of age.[5] Twenty-eight percent of the women were married and 72% were single, separated, divorced or widowed. Seventy-three percent were white and 27% were non-white.[6, 7]

The broad legalization of abortion has been reflected in other important statistical areas as well. Septic abortions in the municipal New York City hospitals decreased 43% from 1969 (before liberalization) to 1973 (three full years following liberalization).[8] A 60% and 70% drop were reported by New York's

---

[4] Weinstock, *et al., Legal Abortions in the United States Since the 1973 Supreme Court Decisions,* 7 FAM. PLAN. PERSP. 23 (1975).

[5] *Legalized Abortion and the Public Health,* INSTITUTE OF MEDICINE: NATIONAL ACADEMY OF SCIENCES, Washington, D.C.: 1975, at 33.

[6] *Id.* at 36, 34.

[7] Statistics compiled on 18,000 procedures performed since May 1, 1973 by Reproductive Health Services in St. Louis, Missouri, the largest volume provider of services in the state, are similar. Two percent were less than 15 years of age, 15% between 15 and 17 years, 14% between 18 and 19 years, 34% between 20 and 24 years, 17% between 25 and 29 years, ten percent between 30 and 34 years, six percent between 35 and 39 years and two percent between 40 and 44 years. Seventy percent were white, 28% black, one percent Oriental and one percent other. Twenty-five percent were married, 57% single, 13% divorced, four percent separated and one percent widowed.

[8] *International Inventory of Information on Induced Abortion,* INTERNATIONAL INSTITUTE FOR THE STUDY OF HUMAN REPRODUCTION, Columbia University, New York: 1974, at 642.

Kings County and Harlem Hospitals, respectively.[9] A similar decline of 68% in San Francisco[10] and 77% in Los Angeles[11] were experienced in California following liberalization. It is not surprising that the number of patient-reported "spontaneous" abortions also reflected a 61% decrease.[12]

Maternal mortality rates have also been lowered. Abortion related deaths in New York fell 76% from before liberalization to the period of 1972-1974.[13] A similar drop of 63% occurred in California.[14] It should be noted that the mortality rate for abortions does not equal the rate of childbirth (using a conservatively low rate for the latter) until the 19th week of pregnancy gestation.[15] Compared to surgical mortality rates generally, legal abortion in the first trimester is almost twice as safe

---

[9] Osofsky, *et al., The Abortion Experience,* Harper and Row, Hagerstown, Md.: 1973.

[10] Stewart, *et al., Therapeutic Abortion in California: Effects on Septic Abortion and Maternal Mortality,* 37 J. OBSTET. AND GYNECOL. 510 (1971).

[11] Seward, *et al., The Effect of Legal Abortion on the Rate of Septic Abortion at a Large County Hospital,* 115 AM. J. OBSTET. AND GYNECOL. 335 (1973).

[12] Goldstein, *et al., Trends in Therapeutic Abortion in San Francisco,* 62 AM. J. PUB. HEALTH 695 (1972). In Missouri, the statistics demonstrate a 62.5% decrease in women reporting a prior illegal abortion when comparing 1973 to 1975. (For source of information, see note 7, *supra.*)

[13] NATIONAL ACADEMY OF SCIENCES, *supra* at note 5, at 83.

[14] Goldstein, *supra* at note 12, at 695.

[15] NATIONAL ACADEMY OF SCIENCES, *supra* at note 5, at 75. When using the maternal mortality rate for 1970 of 26.8 per 100,000 births in the United States, the most recent year for which complete statistics are available; the rate is equal to that for an abortion performed well into the third trimester. *Vital Statistics of the United States (1973),* U.S. DEPT. H.E.W.

as a tonsilectomy and legal abortion in the second trimester is 29 times as safe as an appendectomy.[16]

Births of children by unmarried women have also dramatically decreased by a rate of 12% in states having enacted less restrictive abortion legislation after 1970.[17]

In addition to the myriad of reasons taken under consideration during the abortion decision-making process and previously delineated by this Honorable Court,[18] the increasing use of amniocentesis for the intra-utero determination of metabolic disorders has enabled parents to predetermine the presence of certain suspected chromosomal abnormalities. Nearly 60 such disorders are not potentially discoverable. Results of one study indicated that 64% of parents with one genetically defective child when faced with any risk greater than ten percent of having a second child similarly afflicted, elected not to repeat pregnancy.[19]

The threatened denial of access to public medical facilities for abortions would negate these documented benefits and these advances in the field of genetic counseling. To allow the doors of public hospitals, to be closed without reason to women seeking assistance, would effectively retract the long overdue recognition of women's reproductive rights enunciated in *Roe, supra,* and *Doe, supra.* Unquestionably, the result would be to compel women, and in particular indigent women, once again to seek out illegal avenues of treatment and to suffer the attendant higher incidents of mortality and morbidity inherent in such alternative.

---

[16] Child, *Surgical Intervention,* LIFE AND DEATH AND MEDICINE, W. H. Freeman and Company, San Francisco: 1973, at 65.

[17] Sklar, *et al., Teenage Family Formation in Postwar America,* 6 FAM. PLAN. PERSP. 80 (1974).

[18] *Roe* at 153. *Doe* at 192.

[19] Carter, *et al., Genetic Clinic A Follow-Up,* 1 THE LANCET 281 (1971).

II

The Appellate Court Correctly and Properly Decided That Petitioners' Policies Violated the Standards of Equal Protection, as Constitutionally Afforded to Respondents.

This is not, as Petitioners would have this Honorable Court believe, a question of abortion on demand. (Pet. Br. at 32-51). Not a single abortion was performed in the St. Louis public hospitals between January 1, 1973 and October 16, 1975. The factors creating this deplorable situation were the expressed policy of Petitioner Poelker and the staffing policy of the City Hospitals. Both of these issues were clearly pleaded, presented, briefed, argued and decided in this cause.

A. The staffing policy was clearly within the scope of Respondents' pleadings.

Paragraph 3 of Respondents' "Complaint for Declaratory Judgment and Injunctive Relief," filed August 17, 1973, succinctly, although encompassingly, declared,

> "3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions." (A. 7).

In no manner did Respondents at any time indicate or imply that the only thrust of their action was to void the un-

written oral statements of Petitioner Poelker, directing that abortions not be performed within the public hospital facilities of St. Louis, Missouri, unless medical indications necessary to preserve the life of the patient were indicated.

In fact, the evidence admitted at trial was directed in chief to the staffing policies at Starkloff Memorial Hospital, as well as to Petitioner Poelker's personal fiat. The issue was the non-performance of abortions for whatever reasons, not Petitioner Poelker's religious views.

It is clear that the District Court in its "Memorandum and Order" managed to sidestep entirely the policy of Petitioner Poelker, thereby avoiding any confrontation with and ruling upon said policy. The District Court accomplished this evasion by indirectly finding, although not directly stating, that the policy never applied to Respondent Doe. The District Court found instead that she was refused an abortion by each and every examining physician or medical student for alternative reasons of their own. 515 F.2d at 542. Thus, the District Court relied entirely upon the "personal standards" of the public hospital physicians as the basis for Jane Doe failing to receive abortion treatment; yet the District Court simultaneously refused to examine the pattern and substance of such standards applied to Respondent Doe as a basis for her constitutional claims.

The District Court stated,

> "THE COURT: We're not dealing with that. You're dealing with a policy. If you think under the pleading in the lawsuit I have that we're going to get into the staffing of those hospitals, you're just wrong. We're dealing here with the policy, and if you think that this Court under the pleadings that you have got here—if you want those things, if that's what you're trying to accomplish, and that's what I assumed that you were trying to do, you've got

> another lawsuit. Now, there's testimony in addition to that by one of the people you've got here that one of the sections down there is staffed by Washington University people. Now, you indicated in my office sometime that you wanted to do this. I can tell you in my judgment this lawsuit does not attack the staffing of those hospitals, does not require them to staff in a particular way. This pertains only to a policy that's laid down by the Mayor of the City." (R. 58).
>
> "THE COURT: There's no need to argue that. We've been down that before. I so indicated in the office that I don't understand them (the pleadings) to be so broad. I didn't understand that's what you even were asking for originally and I, in my judgment, if that's what you're after, that's a different ball game. . . . You're going to have to do that in another lawsuit, in my opinion." (Parenthetical material supplied). (R. 60-61).

Respondents from the beginning, since August 17, 1973, sought to challenge the systematic exclusion of all abortions within the public hospitals, regardless of the specific forms assumed by the various restrictive encumbrances, generated by Petitioners. Federal Rule of Civil Procedure No. 8(f) that, "(a)ll pleadings shall be so construed as to do substantial justice" further supports Respondents' contention. Petitioners had adequate notice from the pleadings and throughout the course of this litigation of the policies challenged and the ultimate relief sought by Respondents. Petitioners on no occasion claimed surprise during trial. To have required additional litigation to achieve the result which is constitutionally demanded herein, would have produced substantial justice for neither party. The staffing policy stands as an admitted fact in the record. Only issues of law attendant to it are in dispute.

As the Appellate Court noted,

"From exchanges which occurred during the trial it appears that the district judge thought the complaint was not broad enough to cover an attack on the staffing of the OB-GYN clinic. We disagree. The complaint specifically mentions 'procedures and practices' which thwart the performance of abortions as being under attack. The manner of staffing a hospital is certainly a 'procedure and practice' of that hospital. And, of course, any complaint must be read in the light of Fed.R.Civ.P. 8(f), which states that '(a)ll pleadings shall be so construed as to do substantial justice.'

"The city can hardly complain that it was surprised by the staffing issue in view of the broad wording of the complaint. It certainly knew that the gravamen was an attack on everything the city did which had the effect of keeping abortions from being performed in its hospitals. And when Doe put on evidence relating to staffing, the city did not ask for a continuance or attempt to offer any contrary evidence of its own." 515 F.2d at 543 at n. 4.

Petitioners never sought through pretrial discovery to ascertain the specific policies, practices or procedures under challenge by Respondents. In fact, the District Court never ruled prior to trial that Respondents could not attack the staffing policy. Evidence on such policy was repeatedly admitted by the District Court (R. 33, 41, 50, 52, 54, 58, 59, 97, 98, 107, 124) and the District Court stated the very essence of the staffing policy as fact (R. 34, 50-51). In its opinion, the District Court specifically ruled against Respondents on the merits of the staffing policy.

"In the instant case this Court is not presented with a request from any physician desirous of using the St. Louis City hospital facilities in order to perform an abortion upon his patient. Nor is there anything in the record to show that there is any physician presently on the staff

of either public hospital in St. Louis who is willing to admit the plaintiff as his patient for such a purpose. To the contrary, all of the medical personnel who examined plaintiff at Starkloff Hospital stated emphatically that they hold strong personal beliefs against abortion, and at one point plaintiff was told that there was no one to refer her to who was willing to perform such a procedure in the absence of any medical justification.

"In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles, and this Court will issue no order designed to have such an effect." Pet. W.C. at A-25.

The Appellate Court merely took the legal issue of the Petitioners' staffing policy, erroneously decided by the District Court, and correctly reversed the legal conclusions reached by the District Court.

B. Case law precedents for Respondents' position.

Briefly, the merits may be stated as follows. On January 22, 1973 this Honorable Court rendered its historic decisions recognizing the constitutional right of women to terminate pregnancy in consultation with their physician. *Roe, supra,* and *Doe, supra.* It is difficult to recall other decisions of modern times which have had such a profound and intimate effect upon the lives of so many citizens of our country. Ironically, it is this very right which is invidiously being denied to women, particularly to indigent women, of the City of St. Louis, Missouri.

Although accused of "judicial legislation" by many, this Honorable Court in *Roe, supra,* was explicit and exacting as to

what states may and may not do to regulate the area of abortion. This Honorable Court very early in its decision stated,

> "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. . . . the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late state of pregnancy." 410 U.S. at 150.

This Honorable Court continued,

> "As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved." 410 U.S. at 159.
>
> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .
>
> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U.S. at 163.

Later, this Honorable Court repeated itself so as to make its dictates crystal clear,

> "To summarize and to repeat:
>
> . . .
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164-165.

Petitioners through their admitted, prohibitive policies and practices in regard to abortions, within the publicly maintained and publicly financed hospitals of the City of St. Louis have impermissibly intruded into the decision-making privacy and sphere of the indigent woman. This Honorable Court unequivocably denied to the state or those acting in its behalf the right to dictate medical policy and procedure in the constitutionally protected area of abortion, a right the Petitioners have blatantly usurped.

Petitioners, through their arbitrarily imposed and continued policies and practices, have attempted to dictate to Respondent and other members of her class, municipal decisions in regard to procreation and sexual mores. However, such decisions are

personal to be made by members of the class, as retained by and guaranteed to them by constitutional mandates. See: *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972); *Roe, supra; Doe, supra;* and *Planned Parenthood of Central Missouri*, etc., et al. v. *Danforth*, etc., et al., — U.S. — (1976). This flagrant and unwarranted imposition of the moral values of an elected official upon all, without supporting rationale (R. 10-13), is constitutionally impermissible and its continued force and effect is intolerable.

Respondents do not contend that the staffing of the obstetrical and gynecological department of City Hospital by St. Louis University medical school faculty and students was originally designed to foreclose abortions to patients. Nevertheless, abortions without exception have been excluded partially by reason of the uniformity in the physicians' personally held moral or religious beliefs, attributable to their common association with St. Louis University. The pre-January, 1973 effect of such staffing on the unusually low rate of sterilizations performed and contraception prescribed there can also be statistically demonstrated. It is obvious that since January 22, 1973, Petitioners have continued to deal and to play their hand on this issue with a "stacked deck", by perpetuating staffing policies fully known to foreclose any possibility of abortions being performed in the public hospitals. See pages 9 and 10, *supra*.

To permit this situation to continue would not only have foreclosed the public hospital facilities to women seeking abortions; but would have served to encourage other public hospital facilities to accomplish similarly through this mode of indirection what they had failed, when attempted, to achieve directly.

One salient fact belies all of Petitioners' arguments. Not a single abortion had "been performed at the St. Louis public hospitals since January 1 of 1973 to date" of trial (November 25, 1974). (R. 31). Judicial notice and common knowledge as

to the prevalence of abortion dramatically illustrates the scope of the problem. See notes 3 and 4, *supra*.

It can not seriously be suggested that the obstetrical department at a public hospital could be staffed only by physicians who were strict adherents of "zero population growth"; and accordingly, who refused to render childbirth services to women who previously had borne two children.

The public hospital facilities do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Respondents contend that the burden in this cause has been misplaced by the District Court. Petitioners had admitted throughout this cause the existence of Petitioner Poelker's policy, the staffing policy of the obstetrical and gynecological service and the results, as evidenced in a total absence of abortions performed. (R. 31). The known existence of these policies dissuaded significant numbers of indigent women from even seeking or requesting abortions at the public hospital facilities.

As so aptly noted in *Hathaway* v. *Worcester City Hospital*, et al., 475 F.2d 701 (1st Cir. 1973), *stay denied*, 411 U.S. 929 (1973), the Court of Appeals, in voiding a city hospital policy prohibiting its facilities to be used for sterilization procedures, held,

> "The state interests, recognized by *Roe* as legitimate, are far less compelling in this context. Whatever interest the state might assert in preserving the possibility of future fetuses cannot rival its interest in preserving an actual fetus, which was found sufficiently compelling to outweigh the woman's interest only at the point of viability. The

state maintains of course a significant interest in protecting the health and life of the mother who, as here, cares for others whom the state might otherwise be compelled to povide for. Yet whatever health regulations might be appropriate to vindicate that interest, and on the present record we need not decide the issue, it is clear under *Roe* and *Doe* that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed.

. . .

"*Doe* therefore requires that we hold the hospital's unique ban on sterilization operations violative of the Equal Protection Clause of the Fourteenth Amendment.

> "In so holding, we are not mandating the city or state to maintain this hospital, or to retain its present size, staff or facilities. The hospital is not required to perform all kinds of non-therapeutic or even all therapeutic surgical procedures. We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments, that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." 475 F.2d at 706. See, also, *McCabe* v. *Nassau County Medical Center*, et al., 453 F.2d 698 (2nd Cir. 1971).

Similarly, is *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *remanded*, 434 F.2d 423 (D.C.C. 1970) and *remanded*, 434 F.2d 427 (D. C.C. 1970), in which the Appellate Court held that public hospitals could not constitutionally deny abortions to women seeking them. In *Nyberg*, et al. v. *The City of Virginia*, et al., 495

F.2d 1342 (8th Cir. 1974), *appeal dismissed for want of jurisdiction*, 419 U.S. 891 (1974), the Eighth Circuit noted,

> "The resolution prohibits the use of hospital facilities for the performing of any abortion which is not necessary to preserve the life of the mother. Because we find that the resolution unduly restricts what the United States Supreme Court has held to be a fundamental right, we are compelled to hold the resolution unconstitutional." 495 F.2d at 1343.
>
> . . .
>
> "The language of Roe v. Wade and Doe v. Bolton expressed the plain view that the abortion decision and its implementation is a fundamental right of personal liberty embraced within the Due Process Clause of the Fourteenth Amendment and is thereby protected from undue infringement by the State. In other words, absent compelling circumstances of state interest, regulation of 'certain fundamental rights,' including abortion, is unconstitutional." 495 F.2d at 1344-1345.
>
> "The trial court here, as did the First Circuit in *Hathaway*, felt required to hold that an outright ban on nontherapeutic abortions (Hathaway dealt with a municipal hospital's ban on sterilization operations) was unconstitutional under the teachings of *Doe* and *Roe*. We agree.
>
> "The record in this case demonstrates no compelling circumstances which would mandate this hospital's abortion restricting rules. Nothing on this record indicates that the performance of abortions will interfere with the normal hospital routine or require further staff and facilities. The ban on all abortions other than those to save the mother's life serves neither the hospital nor the state. Doe v. Bolton, *supra* at 198 . . . The sweeping hospital resolution in question here cannot withstand the constitutional

parameters framed by *Doe* and *Roe*. It would be a non-sequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation." 495 F.2d at 1346.

The validity of a policy, practice, statute or ordinance, which results in the arbitrary exclusion of the medical procedure of abortion from the general field of medical services, provided at public facilities is patently and constitutionally defective. In addition to *Nyberg* and other cases cited *supra*, the identical question has been similarly answered in *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975); *Santiago* v. *Colon*, et al., (Unreported, D.P.R. No. 74-362, Aug. 6, 1974); *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D.Neb. 1974); and *Roe v. Arizona Board of Regents*, et al., — Ariz. — (1976), 549 P.2d 150. See *Doe*, etc. v. *Ceci*, etc., 517 F.2d 1203 (7th Cir. 1975). For an insight into the background of an identical situation in Milwaukee, Wisconsin, see Ambrose, "*The Milwaukee Story*: *A Public Hospital's Resistance to the Supreme Court's Abortion Rulings*," 4 FAM. PLAN./POP. REPORTER 68 (1975).

C. **The fashioning of appropriate relief.**

The fashioning by the Appellate Court of appropriate relief (515 F.2d at 546), to include a positive duty upon Petitioners to make every and all reasonable efforts to obtain physicians willing to perform abortions and, in each and every other manner, to offer abortion services to women who desire them, consistent with the manner that other similar or corresponding medical services are provided, is not unique. Medical treatment

has been mandated under related circumstances to effect compliance with constitutional guarantees. See: *e.g.*, *Wyatt* et al. v. *Stickney*, etc., et al., 344 F.Supp. 373 (M.D.Ala. 1972); *Newman*, et al. v. *State of Alabama*, et al., 349 F.Supp. 278 (M.D. Ala. 1972); *Welsh*, et al. v. *Likins*, et al., 373 F.Supp. 487 (D.Minn. 1974); *Nelson*, et al. v. *Heyne*, et al., 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); *Memorial Hospital*, et al. v. *Maricopa County*, et al., 415 U.S. 250 (1974); and *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975).

The fact that the arrangement of staffing the obstetrical-gynecological department by St. Louis University personnel was instituted prior to January 22, 1973 does not excuse its continuation, when the patent and obvious effect is to deny to Respondent's class the right to constitutionally, protected medical services. The pre-existing nature of such circumstances has never justified its continuance, after the effective date of laws defining newly created legal rights or status. No legal right exists to stagnate.

In light of the total and glaring absence of justification offered by Petitioners for their policies, the validity of the same can not be sustained. The rationale of the then existing situation, as amply demonstrated by both the testimony of Petitioner Poelker and of Petitioner Wochner, set forth *supra*, not only was less than "compelling", but bordered on the non-existent.

The District Court in its "Memorandum and Order" cited *Roe*, *supra*, *Doe*, *supra*, and the opinion of the Appellate Court in *Nyberg*, *supra*, to reach its conclusion that,

> "In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established

constitutional principles and this Court will issue no order designed to have such an effect." (Pet. W.C. at A-25).

With all due respect, Respondents suggest that the District Court and Petitioners have misinterpreted the true meanings of *Roe, Doe* and *Nyberg, supra,* and have chosen to apply an interpretation far stricter than that intended by this Honorable Court or by the Eighth Circuit, respectively. Respondents suggest that the passages cited by the District Court (Pet. W.C. at A-23 through A-25) were mere reaffirmations of this Honorable Court's holding in *Roe, supra,* that,

> "This means, on the other hand, that, for the period of pregnancy prior to this, 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." 410 U.S. at 163.

The right of a hospital not to admit nor to treat any specific patient is only again a reaffirmation of the same principle, more explicitly stated in *Doe, supra,* that,

> "*Roe* v. *Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." 410 U.S. at 189.

It is one matter to acknowledge the right of medical institutions and medical personnel to make independent, concurring opinions as to the advisability of performing any specific and individual request for an abortion; and, on the other hand, to exaggerate out of proportion that right into the principle that *all* abortion requests can be denied in arbitrary fashion by a policy which has the inevitable effect of excluding any physician willing to perform a non-therapeutic abortion and of excluding all abortions regardless of physician willingness.

Respondents have the right to receive abortion services on a basis reasonably comparable with the standards and availability of other medical services offered in public hospitals. Admittedly, the physicians staffing the public hospitals in St. Louis and who had contact with Respondent Doe were of a predetermined mind and attitude in regard to abortion. They were morally opposed to abortion, made no effort to refer her to a physician of a different mind, were subject to loss of faculty appointment for assisting her and forbidden by mayoral edict from providing medical services, even had they desired to do so.

For the Petitioners to provide, as the Appellate Court required, abortion services in a similar manner as other pregnancy related services are provided, consistent with equal protection standards, is not synonymous with abortion on demand exclusive of medical consultation and concurrence, as Petitioners so erroneously argue.

Respondents have been denied the "routine, standard, and unbiased medical reports by physician specialists" envisioned by this Honorable Court in *Richardson,* etc. v. *Perales,* 402 U.S. 389 (1971) and *Matthews, etc.* v. *Eldridge,* 424 U.S. 319 (1976).

D. Petitioners' unmet burden of compelling interests.

Threatened here is the right of privacy which originated with *Union Pacific Railway Company* v. *Botsford*[20] and in the present context of procreation is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[21]

This Honorable Court has clearly recognized that the burden of justifying the type of state action challenged here, which in-

---

[20] 141 U.S. 250 (1891).

[21] *Roe* at 153.

fringes upon the right of a woman and her physician to terminate a pregnancy, lies heavily upon the Petitioners.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' "[22]

This principle is particularly applicable when "one's beliefs, ideas, politics, religion, cultural concerns, and the like"[23] become involved; a situation present at bar.[24]

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[25]

Petitioners never sought to justify their position and, in fact, their testimony set out, *infra*, negates any such rational justification. Rather, Petitioners have sought to avoid any direct confrontation with the merits or with the validity of their actions. The correctness of the "compelling state interest" standard has been recognized in identical factual situations by the First[26] and Eighth[27] Circuits.

Durational residency requirements for free medical care have also been held to the standard of "compelling state interest."[28]

---

[22] *Roe* at 155. See, *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 65 (1973).

[23] *The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974).

[24] See, Gelinas, "Roe *v.* Wade *and* Doe *v.* Bolton: *The Compelling State Interest Test in Substantive Due Process*," 30 WASH. & LEE L.REV. 628 (1973).

[25] *O'Connor* v. *Donaldson*, 422 U.S. 563, 575 (1975).

[26] *Hathaway*, *supra*, 475 F.2d at 705; and *Hale Hospital*, *supra*, 500 F.2d at 147.

[27] *Nyberg*, *supra*, 495 F.2d at 1345.

[28] *Memorial Hospital*, et al. v. *Maricopa County*, et al., 415 U.S. 250, 254 (1974).

While this axiom of the heavy burden upon the State to justify legislative interference with the fundamental right to an abortion is capable of being succinctly stated; its importance should not be overshadowed by its brevity or clarity. Petitioners herein have failed to demonstrate and to prove, much less even to suggest, any interests which approach the level of the interests of a woman seeking abortion. No interest even of a rational nature has been offered. Instead, Petitioners have devoted their efforts during three years of litigation to obfuscating or procedural ploys.

It is difficult to refute Petitioners' justifications for its policies, inasmuch as the same have never been clearly set forth at any stage of this litigation.

Petitioners appear to assume that any abortion which does not threaten the life of the patient is not medically or otherwise necessary.

Petitioners further appear to assume that a medical determination as to the advisability of abortion by a slate of physicians morally, religiously and/or contractually opposed to abortion is an objective and unbiased basis of medical treatment.

Both assumptions defy fact and reason and fly in the face of this Honorable Court's own observation that the medical decision of abortion involves emotional, psychological, physical, economic, social and familial factors. *Roe* at 153. *Doe* at 192.

The corollary to the "compelling state interest" requirement, "that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake" (*Roe* at 155) has never been applied here; again, inasmuch as Petitioners have never asserted a single justification for the policies promoted and it is the "Government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests . . .". *Elrod*, etc., et al. v. *Burns*, et al., — U.S. — (1976).

E. **Petitioners' defense of public institutional "conscience".**

The issue of Missouri Revised Statute, Section 197.032, erroneously raised by the District Court in its "Memorandum and Opinion" (Pet. W.C. at A-22) and by Petitioners (Pet. Br. at 42), was adequately dealt with in *Doe* v. *Mundy*, etc., et al., 514 F.2d 1179, 1182 (7th Cir. 1975), where the Appellate Court stated,

> "First, defendants argue that since the hospital's policy was promulgated under an enabling state statute, the plaintiffs are attempting to enjoin operation of the statute itself without convening of the three-judge court required by 28 U.S.C. § 2281. The statute, Wis. Stat. § 140.42, reads in its relevant part:
>
> > '(1) No hospital shall be required to admit any patient or to allow the use of the hospital facilities for the purpose of performing a sterilization procedure or removing a human embryo or fetus.'
>
> Defendants' argument must fail because plaintiffs do not seek state-wide injunctive relief against the operation of a statute; they seek only to enjoin the enforcement of one hospital's rule. Although the conclusion that the statute is unconstitutional may logically follow from the ruling of the District Court, this result does not mean a three-judge court is required. Our conclusion is supported by McCrimmon v. Daley, 418 F.2d 366, 368-369 (7th Cir. 1969), which held that the granting of injunctive relief against the operation of a city ordinance promulgated under a state enabling statute did not require the convening of a three-judge court."

Similarly is the Appellate Court's discussion of the same issue below.

> "The city urges as a defense that its policy and staffing were authorized by Mo. Rev. Stat. § 197.032. . . .

> "Doe does not attack this statute in the instant litigation. None the less, there is no merit to the city's argument. The city's policies and acts must be judged against the Federal Constitution in this action under 42 U.S.C. § 1983. . . .
>
> "It may appear to follow logically from our holding in this case that the Missouri statute is unconstitutional." 515 F.2d at 545-546 at n. 7.

As recently noted by the Sixth Circuit,

> "However, the conscience clause cannot constitutionally permit 'public' hospitals ('state actors'), to refuse to permit the performance of abortions for 'ethical' reasons. Such permission would circumvent, if not directly contravene, *Roe, supra*, 410 U.S. at 164-165, 93 S.Ct. at 732, 35 L.Ed.2d at — , which permits the state to interfere with the woman's abortion decision only in the second trimester, and then only to protect maternal health, and in the post-viability stage, to protect maternal health and fetal life. The conscience clause, as applied to public hospitals, unconstitutionally interferes with the woman's constitutional right to abortion by permitting public hospitals to proscribe first trimester abortions and to proscribe second trimester abortions on grounds broader than 'maternal health.' . . .
>
> "We agree with *Hathaway, supra*, and *Nyberg, supra*, that certain *Bolton* language cannot shield the 'institutional conscience clause,' as applied to public hospitals, from constitutional challange. Admittedly, *Bolton* favorably cited a facially unlimited Georgia 'institutional conscience clause,' but the Court quickly noted the clause was 'obviously' designed 'to afford appropriate protection to the individual and to the denominational hospital.' 410 U.S. at 197-198, 93 S. Ct. at 750, — L.Ed.2d at — . *Hathaway* noted that the reference to the Georgia clause 'cannot,

of course, be taken as approving a similar ban in a state or state-supported hospital, . . . subject to the First and Fourteenth Amendments. . . .' 475 F.2d at 706 n. 4. Accord, *Nyberg, supra,* 495 F.2d at 1346-1347.

A more narrowly drafted 'conscience' clause, however, would presumably be constitutional if limited to permitting public hospitals to refuse to allow post-viability abortions for the 'ethical . . . interest in the potentiality of human life . . . except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " *Wolfe,* et al. v. *Schroering,* etc., et al., — F.2d — (6th Cir. 1976).

The District Court threatened to delay the trial by certifying the case as one requiring a statutory three-judge panel on the basis of the affirmative defense raised by Petitioners as to Mo. Rev. Stat. § 197.032 (A. 16-17, 22-23). To avoid further delay, despite the obvious error of the District Court's reasoning, Respondents had no alternative but to amend their Complaint by deletion of the request for injunctive relief in order to avoid the language of 28 U.S.C. § 2281, as interpreted by the District Court.

F. **Abortion as a legislatively non-favored choice.**

Specific state schemes, which unconstitutionally favor a woman's election to carry a pregnancy to term as opposed to terminating the pregnancy, have consistently been invalidated by the courts.

Roe clearly held that the decision to abort was a matter of privacy encompassed within the spectrum of a fundamental right.[29] Where fundamental rights, involving abortion[30] or

[29] *Roe* at 155.

[30] *Doe* at 194.

other forms of contraception,[31] are involved, "it is impermissible to treat differently two classes which do not differ on any ground related to the purpose of the challenged statute."[32]

The invalidity on equal protection grounds of policies which favor childbirth over abortion has been adopted in the analogous line of authority voiding Medicaid statutes which exclude payment for abortion[33] and identical cases voiding public hospital policies which exclude abortion procedures.[34]

As so aptly stated by the first court to examine the issue,

"The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly dis-

[31] *Eisenstadt,* etc. v. *Baird,* 405 U.S. 438, 453 (1972).

[32] *Friendship Medical Center, Ltd.,* et al. v. *The Chicago Board of Health,* et al., 505 F.2d 1141, 1152 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975).

[33] *Klein,* et al. v. *Nassau County Medical Center,* et al., 409 F. Supp. 731, 733 (E.D.N.Y. 1976); *Doe,* et al. v. *Rose,* etc., 380 F. Supp. 779, 781 (D.Utah 1973), *affirmed,* 499 F.2d 1112, 1114 (10th Cir. 1974); *Doe* v. *Rampton,* etc., et al., 366 F.Supp. 189, 192 (D.Utah 1973); *Doe,* et al. v. *Wohlgemuth,* et al., 376 F.Supp. 173, 177-178 (W.D.Penn. 1974), *affirmed on other grounds* sub nom. *Doe,* et al. v. *Beal,* etc., et al., 523 F.2d 611 (3rd Cir. 1975); *Doe,* et al. v. *Westby,* et al., 402 F.Supp. 140, 144 (D.S.D. 1975); *Wulff,* et al. v. *Singleton,* etc., 508 F.2d 1211, 1215 (8th Cir. 1974), *reversed and remanded on other grounds,* — U.S. — (1976); *Doe,* et al. v. *Myatt,* et al., —F.Supp. — (D.N.D. 1975); *Planned Parenthood Association,* et al. v. *Fitzpatrick,* et al., 401 F.Supp. 554, 580 (E.D.Pa. 1975), *vacated and remanded on other grounds,* — U.S. — (1976). See, also, *Coe,* et al. v. *Hooker,* et al., 406 F.Supp. 1072, 1080 (D.N.H. 1976), holding that statutory requirements mandate medicaid payments for abortions because,

"These statutory limitations, especially the equality and the arbitrary denial provisions are essentially the same as constitutional guarantees. Medicaid recipients are thus statutorily guaranteed equal protection and due process of the law."

[34] *Nyberg, supra,* 495 F.2d at 1346; *Hale Hospital, supra,* 500 F.2d at 146; *Doe* v. *Charleston Area Medical Center, Inc.,* et al., 529 F.2d 638, 645 (4th Cir. 1975); *Santiago* v. *Colon,* et al. (Un-

favored choice, and no other basis appears here for denying medical assistance."[35]

The economic "medical assistance" which formed the basis for unconstitutional discrimination by the state in *Klein, supra,* is indistinguishable from the discriminatory policy encumbrances in the present cause. The form of the assistance, whether as monies, facilities, supplies, personnel, *etc.* is not a constitutionally controlling distinction. This has been the clear lesson in cases involving government aid to private denominational schools.[36] In each of the challenged policies in this cause, the Petitioners dramatically have preferred childbirth over abortion by encumbering in discriminatory fashion the latter.

As the Court in *Klein, supra,* went on to note,

"Beyond that, it may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interests in freely determining whether or not to bear a child."[37]

The herein challenged policies deny to pregnant women desiring to abort the equal protection of the laws to which they

---

reported, D.P.R., No. 74-362, Aug. 6, 1974); *Orr,* et al. v. *Koefoot,* et al., 377 F.Supp. 673, 681-684 (D.Neb. 1974); and *Roe* v. *Arizona Board of Regents,* et al., — Ariz. — (1976), 549 P.2d 150. See, also: *Doe* v. *Mundy,* et al., 514 F.2d 1179 (7th Cir. 1975); and *Doe,* etc. v. *Ceci,* etc., 517 F.2d 1203 (7th Cir. 1975).

[35] *Klein,* et al. v. *Nassau County Medical Center,* et al., 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *affirmed on remand,* 409 F.Supp. 731 (E.D.N.Y. 1976).

[36] *Sloan,* etc., et al. v. *Lemon,* et al., 413 U.S. 825 (1973) (monies); *Tilton,* et al. v. *Richardson,* etc., et al., 403 U.S. 672 (1971) (facilities); *Meek,* et al. v. *Pittenger,* etc., et al., 421 U.S. 349 (1975) (supplies); and *Earley,* et al. v. *DiCenso,* et al., 403 U.S. 602 (1971) (personnel).

[37] *Klein, supra* at n. 35.

are constitutionally entitled. They alone are subjected to economic coercion to bear children, which they have no desire to bear or to raise; while women desiring to bear children are not simply coerced. In fact, women desiring to give birth are given complete freedom to choose their favored alternative, encouraged by economic inducement and influenced only by the multitude of individual considerations which directly and relevantly bear upon the problem, unstructured and unimpeded by state action.

The rights to use contraception[38] or to terminate a pregnancy[39] as pronounced by this Honorable Court, are neither less nor more equal than the rights to beget[40] and to raise children.[41] Parenthood or non-parenthood is a matter of individual privacy and,

"If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[42]

The state has no legitimate interest in favoring parenthood in its citizens. Petitioners have never advanced a legitimate reason for such a position in this cause. The three reasons advanced by the State of Texas in defense of its restrictive abortion statute,

---

[38] *Griswold,* et al. v. *Connecticut,* 381 U.S. 479 (1965); and *Eisenstadt,* etc. v. *Baird,* 405 U.S. 438 (1972).

[39] *Roe* and *Doe.*

[40] *Skinner* v. *Oklahoma* ex rel. *Williamson,* etc., 316 U.S. 535 (1942).

[41] *Pierce,* etc., et al. v. *Society of Sisters,* 268 U.S. 510 (1925); and *Meyer* v. *State of Nebraska,* 262 U.S. 390 (1923).

[42] *Eisenstadt, supra* at note 38, at 453.

"illicit sexual conduct",[43] safe "medical procedure"[44] and "protecting prenatal life"[45] were all discounted and refuted in *Roe*.[46]

Even assuming *arguendo*, that a rational basis is the standard to be applied; as this Honorable Court noted in *United States Department of Agriculture*, et al. v. *Moreno*, et al., 413 U.S. 528 (1973),

> "Under traditional equal protection anaylsis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." 413 U.S. at 533.
>
> . . .
>
> "Traditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety'. *Dandridge v. Williams*, 397 U.S., at 485. But the classification here in issue is not only 'imprecise,' it is wholly without any rational basis." 413 U.S. at 538.

Could the converse situation ever seriously be suggested as constitutional? *I.e.*, the state could provide abortion services within the public hospitals and use medical funds to reimburse abortion expenses, while prohibiting the use of public hospital facilities and medicaid funds for maternity and child birth services. Clearly, the answer is no!

As noted by the Fourth Circuit in the most recent hospital facility case, the hospital must,

> ". . . admit patients seeking abortions on the same basis as patients seeking other surgical procedures of similar difficulty and involving to a similar extent the use of hospital facilities, all in accord with the command of *Roe*, *supra*, 410 U.S. at 164, 93 S.Ct. 705." *Doe* v. *Charleston Area Medical Center, Inc.*, et al., 529 F.2d 638, 645 (4th Cir. 1975).

[43] *Roe* at 148.

[44] *Ibid.*

[45] *Id.* at 150.

[46] *Id.* at 148-152.

Petitioner Wochner testified that the financial costs of early abortions is less than the cost of providing childbirth services and that he would have provided abortion services within the public hospitals had he not been directed to the contrary by Petitioner Poelker. (R. 22-23; 30-31).

Petitioners have chosen to offer medical treatment for the condition of pregnancy within the public hospitals; but they have simultaneously and arbitrarily excluded abortion, one recognized course of treatment for that condition. The federal courts have consistently made clear that the treatment of pregnancy includes abortion and abortion may not be arbitrarily

As clearly enunciated in the original *Klein*, *supra*, decision, stigmatized as a method of treatment.

> "Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and undeniably it is provided under the Medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in child birth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance. The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance." 347 F.Supp. at 500.

And as most recently stated,

"The fact that women in the early stages of pregnancy can choose between alternative methods of treatment, neither of which will greatly endanger their lives or physical health, does not make either alternative less necessary than the other. Defendants infer from the fact of the choice that one of the options is not 'necessary.' It is the voluntary character of the choice at the time that it is made that defendants use to differentiate elective abortions from other medical procedures. However, the election is not as free as defendants assert. Once pregnant, a woman is in need of medical treatment, and she must choose one service or another. She is not acting out of whim; she is choosing, in her own best interests, between alternative methods of treatment for a condition which defendants recognize places her in need of medical attention. Nontherapeutic abortions are no less necessary than other methods of treatment of pregnancy merely because a woman has the option of carrying her pregnancy to full-term, an alternative which defendants find preferable." *Coe*, et al. v. *Hooker*, et al., 406 F.Supp. 1072, 1082-1083 (D. N.H. 1976).

Lastly,

> "The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned from the various opinions in *Roe* and *Doe*. *See Roe* v. *Wade*, *supra*, 410 U.S. at 129-147, 148-50, and 170, 93 S.Ct. 705 (Stewart, J., concurring); *Doe* v. *Bolton*, *supra*, 410 U.S. at 218-20, 93 S.Ct. 739 (Douglas, J., concurring); *Doe* v. *Beal*, 523 F.2d 611, 622 (3d Cir. 1975); *Wolfe* v. *Schroering*, 388 F.Supp 631, 637 (W.D. Ky. 1974); . . ." *Roe*, et al. v. *Norton*, etc., et al., 408 F.Supp. 660, 663 at n. 3 (D. Conn. 1975).

G. **The imposition of an unconstitutional condition.**

This Honorable Court has consistently prohibited the granting or denial by the state of a privilege or benefit, premised upon the surrendering of a constitutional right. In *Memorial Hospital*, *supra*, the infringement imposed by the State of Arizona upon the fundamental right to interstate travel, by the withholding of medical treatment to residents of less than one year duration, was voided. What was true in *Memorial Hospital*, *supra*, concerning the right to travel is even more emphatic in regard to the fundamental right of privacy surrounding the abortion decision. The decision to terminate a pregnancy is one directly bearing on the life of the pregnant woman. The maternal mortality rate for abortion at all stages of gestation in 1974 was 3.1 per 100,000,[47] while the maternal mortality rate for childbirth was 26.8 per 100,000.[48, 49]

> ". . . it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Memorial Hospital*, 415 U.S. at 259.
>
> "The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment." *Id.* at 261.

As recently stated in the analogous medicaid context,

> "When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and post-

---

[47] *Center for Disease Control*: *Abortion Surveillance*: *1974*, U.S. DEPT. H.E.W. (1976), at 5.

[48] *Vital Statistics of the United States (1973)*, U.S. DEPT H.E.W.

[49] For findings identical to those in notes 47 and 48; see, *Induced Abortion*: *1975 Factbook*, REPORTS ON POPULATION/FAMILY PLANNING, Population Council, New York: December 1975.

natal care, it weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed. 2d 306 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); cf. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn v. Blumstein*, 405 U.S. 330, 338-42, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)." *Roe*, et al. v. *Norton*, etc., et al., 408 F.Supp. 660, 663-664 (D. Conn. 1975).

This Honorable Court in *Sherbert* v. *Verner*, et al., etc., et al., 374 U.S. 398, 405 (1963), noted in regard to the parallel extension of a state benefit in *Speiser* v. *Randall*, etc., 357 U.S. 513 (1958) that,

> "While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of . . . rights . . . and thereby threatened to 'produce a result which the State could not command directly.' "

The "carrot and stick" erosion of constitutional rights by state action has been refuted consistently by this Honorable Court since *Missouri* ex rel. *Gaines* v. *Canada*, etc., 305 U.S. 337 (1938).

H. **The socio-economic discrimination.**

Any state action encumbrances which restrict access to abortions at public hospitals, disproportionately compound the availability of abortions for indigent women. Economically advantaged women, more readily able to afford the luxuries of private physicians, have the means and access to obtain the desired medical services, outside the sphere of Petitioners' policies.

On their face, the challenged policies make no distinction on the basis of a patient's race, economic status or social position. Yet, as applied, these and similar policies have systematically come to deny safe medical abortions to the poor and to other minority groups. Moreover, illegal abortions and their concomitant incidents of morbidity and mortality appear to occur largely among the economically deprived sectors of our society. Several scholarly studies from the medical literature thoroughly document this discrimination.

The "Gold study"[50] covers the 1943 to 1962 period in New York City. Gold showed that from 1960-1962, for example, 55.6% of the puerperal deaths among the Puerto Rican population were due to abortion. In the same period 49.4% nonwhite puerperal deaths had the same cause, but among whites the figure was only 25.2%. In other words, well over half of the deaths associated with child-bearing of Puerto Rican women, and one-half of the same kinds of deaths of nonwhite women came from bungled abortion.[51]

Not only did Puerto Rican and nonwhite women get the worst nonmedical abortions, but they received very few of the abor-

---

[50] Gold, *et al.*, *Therapeutic Abortions in New York City: A 20-Year Review*, 55 AM.J.PUB.HEALTH 964 (1965).

[51] *Id.* at 965, at Table 1.

tions granted by hospital committees. The Gold study further revealed that white women obtained 92.7% of the hospital abortions granted in 1960 to 1962, as contrasted with 0.9% Puerto Rican and 6.4% nonwhite. Whites received 103 (92.7) / (0.9) times as many abortions as Puerto Ricans and 14.5 (92.7) / (6.4) times as many as nonwhites.[52]

Two studies of hospitals across the United States reveal the same pattern of discrimination against indigent ward patients. A 1965 study by Dr. Robert E. Hall, of 60 major American hospitals revealed that the abortion/delivery ratio for private patients was three and six-tenths times higher than that for ward patients.[53] Similarly, a 1968 study be Dr. Christopher Tietze[54] dealt with the ethnic characteristics of aborted patients and the indications for hospital therapeutic abortions at several hundred American hospitals which participate in the yearly Professional Activities Survey.[55] Thirty-four percent of the abortions counted in the survey were done for "psychiatric" indications.[56] And, "the incidence of therapeutic abortion was almost twice as high among white women as among the nonwhite group."[57]

---

[52] *Id.* at 966, at Table 3.

[53] Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 AM.J.OBSTET. AND GYNECOL. 518, 524-525 at Table VI (1965).

[54] Tietze, *Therapeutic Abortions in the United States*, 101 AM.J. OBSTET. AND GYNECOL. 784 (1968).

[55] These hospitals numbered "269 in 1963, 321 in 1964, and 384 in 1965." *Id.* at 784.

[56] *Id.* at 785, at Table I.

[57] *Id.* at 786.

In the two Missouri hospitals included in Hall's study, *supra*, St. Louis Maternity (Barnes) and the University of Missouri Medical Center at Columbia, the ratio of combined abortions to deliveries among private patients was 1:1,426 and among ward patients was 1:3,515; two and one-half times as high among the former as the latter. There is no reason to suspect that the results of studies elsewhere in the United States differ in any significant manner from conditions and circumstances in Missouri, even today, as shall appear, *infra*.

This discrimination, it should be noted, is not the inevitable result of unequal distribution of societal wealth. It is the product both of governmental action and inaction. Public hospitals simply do not provide the desired access to abortion on the same scale as do private institutions. Except in cases where abortion would be deemed necessary to save a patient's life, to a greater or lesser degree, the public hospital does not provide full informational, diagnostic and treatment facilities to the indigent patient.[58] Political pressure from special interest groups have greatly influenced hospital policy regarding abortion and the fundamental rights of women as to abortion have become a political football.

Perhaps no other factor has played so great a role in recent changes in abortion laws, as the unquestionable realization that abortion had always been freely available, virtually upon request, to those with means. Medical abortions continue, however, to be all too frequently beyond the reach of the poor, and they consequently turn to local quacks, midwives, plumbers and even worse. The result is the paradox that can be found in any large metropolitan community. Wealthy women enter the front door

---

[58] See, *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 39, at Table Y, indicating that only 15% of the nation's public hospitals were providing abortions by the first quarter of 1974.

of a private hospital or facility. They receive a medical abortion under the finest of conditions. The poor woman enters the public hospital through the back door, often on the verge of death. She has had a septic abortion which has caused serious infection, bleeding and, on occasion, death.[59] The hospital authorities complete this abortion and administer antibiotics, transfusions and intense care. The impoverished woman remains several days and may recover, at considerable cost to the State. State acquiescence in the hundredfold recurrence of this paradox is the cause of this socio-economic discrimination. A decision by this Honorable Court would swing open wide the public hospital's front door to the impoverished woman and eliminate much of the incontrovertible discrimination complained of herein.

If the Petitioners' policies expressly limited the number of abortions for ward and indigent patients, or, if the rules of a particular hospital so provided, the statute on its face would be unconstitutional. It has repeatedly been said, " 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." *Edwards* v. *California*, 314 U.S. 160, 184-185 (1941) (concurring opinion of Mr. Justice Jackson). In the abortion context, however, indigency is a relevant, indeed a crucial factor. Arguably it is the only factor. Both of the challenged policies serve to thwart the poor in their access to a medical procedure—abortion—which is commonly available to those with funds and contacts.

In recent years, this Honorable Court has focused upon laws which in effect discriminate against individuals because of poverty. In *Griffin*, et al. v. *Illinois*, 351 U.S. 12 (1956), two indigent defendants could not appeal as otherwise they could have of right under Illinois law, because they could not afford a needed trial transcript. The state statute made such tran-

[59] See, The St. Louis *Post Dispatch*, June 10, 1975, at 1 and 8.

scripts equally available to all who could pay the required fee. While recognizing that the Constitution does not necessarily require any appellate review, this Honorable Court held that once a state grants review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty."[60]

The Court stated,

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[61]

Harper, et al. v. *Virginia Board of Elections*, et al., 383 U.S. 663 (1966), a decision dealing with the poll tax, also illustrates this Honorable Court's concern with the effect of poverty upon the exercise of fundamental personal rights. In declaring the Virginia poll tax of $1.50 per person unconstitutional under the equal protection clause, this Honorable Court emphasized that the right of suffrage is a fundamental one in a free society. The State had pointed out that it exacts fees for many purposes from its citizens. In reply to this argument this Honorable Court said,

> "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To intro-

[60] 351 U.S. at 18.

[61] *Id.* at 18-19. See, also, *Douglas*, et al. v. *California*, 372 U.S. 353 (1963).

duce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the circumstances is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause."[62]

While *Griffin, supra,* involved the criminal process, and *Harper, supra,* the vote, Respondents are asserting rights of equal constitutional stature, and in an area of human behavior of equal importance. As this Honorable Court stated with reference to privacy in *Griswold, supra,* "(w)e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[63]

Equal protection concepts have matured in recent years. States are being required to take steps to remove criminal, civil and administrative inequities which are not directly the State's creation. Thus in the circumstances present in *Griffin, supra,* and *Douglas, supra,* and their progeny, the indigent were to be provided respectively with free transcripts and free appellate counsel; in *Harper, supra,* no person could be required to pay a poll tax. Indigency and financial burdens have similarly been held void when used to prevent candidacy for public office.[64]

Commentators have pointed to this emphasis "upon measures the states adopt in carrying on their activities and steps they must take to offset disabilities not of their creation,"[65]

---

[62] 383 U.S. at 668.

[63] *Griswold, supra* at note 38, at 486.

[64] *Lubin* v. *Panish,* etc., 415 U.S. 709 (1974); and *Bullock,* et al. v. *Carter,* et al., 405 U.S. 134 (1972).

[65] Cox, *THE SUPREME COURT 1965 TERM Forward: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV.L.REV. 91, 93 (1966).

and have discussed this trend in relation to traditional equal protection theory.[66] What emerges is a requirement that the state give "attention to those inequalities for which it is not directly responsible, but which nevertheless are concomitant features of the existence of the organized state," and "adopt a standard of proportional equality which takes account of the differing needs of its citizens, whenever those needs stand in the way of equal access to the basic resources of national life."[67]

Analogously, indigents have been granted access to the courts for dissolution of their marriages,[68] marriage being a fundamental right involving privacy.[69]

While it is true that not every inequality constitutes a denial of equal protection, basic rights are involved here and under the present system the lives and the health of poor patients are drastically affected through the denial of proper medical care, free from the rigors of the Petitioners' moral strictures.

What was said by Mr. Justice White in his concurring opinion in *Griswold, supra,* is equally applicable here,

> "(T)he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth

---

[66] See, generally: Michelman, THE SUPREME COURT 1968 TERM Forward: *On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV.L.REV. 7 (1969); Goldberg, *Equality and Governmental Action,* 39 N.Y.U.L. REV. 205 (1964); and Note, *Discriminations Against the Poor and the Fourteenth Amendment,* 81 HARV.L.REV. 435 (1967).

[67] *Developments in the Law Equal Protection,* 82 HARV.L. REV. 1065, 1189-1190 (1969).

[68] *Boddie,* et al. v. *Connecticut,* et al., 401 U.S. 371 (1971).

[69] *Loving,* et ux. v. *Virginia,* 388 U.S. 1 (1967).

> control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Skinner* v. *Oklahoma*, 316 U.S. 535 . . ."[70]

In *United States* v. *Vuitch*,[71] the District Court discussed this claim briefly,

> "National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately."[72]

What this Honorable Court stated in *Lindsey*, et al. v. *Normet*, et al., 405 U.S. 56, 79 (1972), regarding the posting and forfeiture of double bond for tenant appeals is equally applicable here.

> "The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their cause."

In the City of St. Louis, the indigent pregnant patient desiring to terminate pregnancy is utterly foreclosed from the public facilities, which otherwise proved her a full range of medical services. She is forced to seek the charity of the private medical sector for assistance or go unattended, no matter how meritorious her cause.

---

[70] 381 U.S. at 503.

[71] 305 F.Supp. 1302 (D.D.C. 1969), *reversed on other grounds*, 402 U.S. 62 (1971).

[72] *Id.* at 1035.

The singling out of one class of indigents for punitive and discriminatory treatment has been denounced by this Honorable Court.[73]

The exaggerated effect of restrictive abortion legislation upon the poor has been repeatedly recognized in Medicaid cases, specifically applicable to indigents, and in other public hospital cases, not specifically applicable to indigents. (See notes 33 and 34, *supra*.)

In the instant case, as in *Griswold*, *supra*, and *Vuitch*, *supra*, the statutes in question have resulted in a discrimination against the poor. It should not matter whether or not the discrimination was the result of a conscious policy, for the Petitioners have consciously adopted and retained abortion policies which inexorably leads to the systematic socio-economic discrimination described. The previous distinction between government benefits being construed as "rights" or as "privileges" no longer is of constitutional import. *Graham*, etc. v. *Richardson*, et al., 403 U.S. 365, 374 (1971).

As the Eighth Circuit succinctly noted in this case,

> "Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women, like Doe, that if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth. Roe v. Wade, 410 U.S. 113, 163, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). No rational or legally cognizable basis for this distinction is offered." 515 F.2d at 544.

---

[73] *James*, etc., et al. v. *Strange*, 407 U.S. 128, 142 (1972).

The effect of these policies upon the delivery of services in St. Louis is catastrophic. By April of 1974, only four per cent of the public hospitals in Missouri offered abortion services.[74] In 1974 in the St. Louis area, the estimated need for abortion services was 17,105 cases, of which 7,710 or 45% were women of low or marginal income status.[75] The total percentage of the need for services which was met by existing facilities was a meager 20.5%.[76]

I. **Petitioners' lament.**

Petitioners expend many words and pages in their Brief whining about their own failure to utilize effectively pre-trial discovery. The failure is entirely of Petitioners' making. Petitioners never submitted interrogatories to Respondents, were able to take Respondent Doe's deposition prior to trial and never sought delay of the trial. They utterly fail to suggest how they have been prejudiced in any manner, since each and every District Court decision was at their prompting and in their favor.

The failure of Petitioners to discover the identity of Respondent Doe at an earlier point of time lies entirely upon them. They never previously sought to take her deposition nor in any manner pressed for discovery. Petitioners fault Respondents for utilizing discovery and complain that Respondents "pressed . . . (them) to make admissions through answering interrogatories . . ." (Pet. Br. at 53). It is incomprehensible how Respondents can logically be chided for exercising discovery procedures.

---

[74] *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 39, at Table Y.

[75] *Id.* at 56, at Table 2.

[76] *Id.* at 61, at Table 4.

Next, Petitioners chide Respondents for pressing for summary judgment, a motion not granted by the District Court. (Pet. Br. at 54). Once again, Petitioners choose to accuse Respondents' counsel of filing a false affidavit (Pet. Br. at 54), a claim made by Petitioners at every level of proceedings. Neither the District Court nor the Court of Appeals on any of three occasions saw fit to ever acknowledge Petitioners' claim in this regard. How logically can Petitioners be heard to complain, when the District Court did dismiss the action for lack of standing.

Respondents have no desire to dispute at length Petitioners' statements as to the events occurring during pre-trial conferences. Respondents do state emphatically that they deny and reject categorically as untrue Petitioners' statements contained within their Brief (Pet. Br. at 52-62), which are not specific matters of record. They are merely Petitioners' subjective conclusions, far removed from fact, reality or law.

III

The Appellate Court Correctly and Properly Awarded to Respondents Their Attorneys' Fees on the Basis of Petitioner Poelker's "Bad Faith".

The Appellate Court's award of attorney fees on the basis of bad faith was amply supported by the record, the content of Petitioners' pleadings filed throughout the course of the District Court litigation (*e.g.*, see 515 F.2d at 547-48, at n. 8), the position and language of Petitioners' appellate briefs and the oral argument and conduct of Petitioners' counsel at appellate hearings. There was no need for additional hearings on the issue and such hearings could not have negated Petitioners' conduct, as exemplified in the manners above set forth.

In addition, the record clearly evidenced the following uncontroverted facts.

Petitioner Poelker, Mayor of the City of St. Louis, testified that Petitioner Wochner served as his appointee. (R. 3). Prior to and since April 5, 1973, Petitioner Poelker, through Petitioner Wochner, had enforced the policy that no abortions be performed within the city public hospitals unless "the life of the mother is in danger". (R. 6). The only stated reason for adoption of the policy by Petitioner Poelker was "my own personal conviction that abortion is murder". (R. 10). Both Petitioners Poelker and Wochner testified that the policy was enforced despite the fact that no investigations, studies or surveys were ever made in regard to: the possibility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle City Hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). But for the directions of Petitioner Poelker, Petitioner Wochner, Director of Health and Hospitals for the City of St. Louis and Acting Hospital Commissioner for the City of St. Louis (R. 19, 22-23), would have provided abortions within the public hospital facilities. (R. 31).

The public hospital facilities did and do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Finally, Petitioner Wochner testified that not a single abortion had "been performed at the St. Louis public hospitals since January 1 of 1973 to date" (November 25, 1974). (R. 31).

Petitioner Poelker has never sought to justify his actions, other than by his personally held beliefs. In no manner can the award

by the Court of Appeals be considered an abuse of discretion, which Petitioners agree is the proper standard of review. (Pet. Br. at 61). Judges Ross and Smith participated in the prior appellate decision reported at 497 F.2d 1063 (8th Cir. 1974), as well.

Judge Van Oosterhout, who dissented from the award of fees on the basis of bad faith, did concur in the award of fees on the basis of "private attorney general". (Pet. W.C. at A-38). The Appellate Court's award on the basis of "bad faith" was not a new theory for as the Court of Appeals, Judge Van Oosterhout concurring, had earlier noted,

> "Doe suggests that awarding attorneys' fees would be proper here under another exception to the rule—where a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . However, in light of our determination that attorneys' fees are to be awarded under the 'private attorney general' theory, we need not and do not decide whether or not the actions of the city underlying this litigation and during the course of it call for application of this second exception." Pet. W.C. at A-37 through A-38.

There is no issue here of the Court of Appeals offering to Respondents a trial *de novo*. The judgments of the Court of Appeals are all founded upon the correct application of legal principles to uncontroverted and unambiguous factual circumstances. The characterization of Petitioner Poelker as "arbitrary," "obstinate", "intransigent", "wanton", "callous", "oppressive" and "obdurate" was not lightly made. (515 F.2d at 541-548).

The proper award of attorneys' fees in this case has served notice upon the public officials of the City of St. Louis that they may not continue in cavalier fashion to infringe abortion rights, without shouldering the financial burden of those who continue to challenge the same successfully in the courts.

The facts as to Respondent Doe's obligation to pay fees, as to her having incurred the same or as to their ultimate disposition are not relevant.[77]

IV

The Appellate Court Correctly and Properly Decided That Respondent Doe Had Standing on Her Own Behalf and on Behalf of Her Class.

Respondent Doe was pregnant on August 17, 1973 as alleged in her "Complaint for Declaratory Judgment and Injunctive Relief," paragraph 7, filed on August 17, 1973 (A. 7) and as verified in her "Affidavit of Plaintiff, Jane Doe," paragraph 4, filed on October 5, 1973. (A. 38). In fact, Respondent Doe on August 17, 1973 was in the last few days of the first trimester of pregnancy. Her inability to obtain an immediate abortion would have foreclosed the possibility of obtaining an out-patient clinical procedure and have necessitated an in-patient surgical method involving substantially, increased, risk to her.

Respondent Doe readily admitted that she obtained an abortion on August 22, 1973. The mortality and morbidity of abortion increases with every passing day of gestation. The natural reticence of potential plaintiffs in actions of this type, who are willing to brave the risk of public disclosure, harassment and distain must not be ignored;[78] particularly since many of those who utilize the public hospital facilities are least able to afford the financial, energy and time expenses of litigation.

---

[77] See: *Fairley*, et al., etc. v. *Patterson*, etc., et al., 493 F.2d 598, 606-607 (5th Cir. 1974); *Brandenburger*, et al. v. *Thompson*, etc., 494 F.2d 885, 889 (9th Cir. 1974); and *Hairston* v. *R & R Apartments*, et al., 510 F.2d 1090, 1092-1093 (7th Cir. 1975).

[78] *Singleton*, etc. v. *Wulff*, et al., — U.S. — (1976); and 515 F.2d at 542, at n. 1.

Respondents would direct the attention of this Honorable Court to its language in *Roe*, *supra*, wherein it unequivocably answered the specific question of the effect of a pregnancy's termination on mootness.

> "A. *Jane Roe*. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> . . .
>
> "The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.
>
> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. . . .
>
> "But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' . . .

"We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot." 410 U.S. at 124-125.

Similarly, is *Doe, supra,* decided the same day in which this Honorable Court, noting that the action was filed on April 16, 1970 (410 U.S. at 184), held pregnancy on day of filing to be sufficient, without evidence or notation of pregnancy beyond that date.

"Our decision in Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, establishes (1) that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutional issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action.

". . . Doe and her class are recognized . . ." 410 U.S. at 187-188.

Additional cases involving pregnant plaintiffs representing such a class and in which the named plaintiffs were no longer pregnant at later stages of trial or appeal, although pregnant at institution of suit are: *Doe*, et al. v. *Bolton*, et al., 319 F.Supp. 1048 (N. D.Ga. 1970); *Doe*, et al. v. *Scott*, etc., et al., 321 F.Supp. 1385 (N.D.Ill. 1971); *Poe*, et al. v *Menghini*, et al., 339 F.Supp. 986 (D.Kan. 1972); and *Roe*, et al. v. *Wade*, 314 F.Supp. 1217 (N.D.Tex. 1970), among a multitude of others.

As so aptly noted in the original *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F.Supp. 496, 499 (E.D.N.Y. 1972),

"The issues of right presented are such that 'class' action is peculiarly appropriate, indeed necessary. De-

fendants' refusal to act as plaintiffs requested was based upon grounds generally and uniformly applicable to the class of which plaintiffs were members at the time they joined or initiated the action as parties plaintiff, and it is appropriate that the relief granted in the action be granted with respect to the entire class (a class of changing membership but of constant defining characteristics) of pregnant women who within twenty-four weeks after the commencement of their pregnancy apply for abortional procedure at the Nassau County Medical Center without showing that abortion is medically indicated, whose income and resources are insufficient to meet the costs of necessary medical service, and who are eligible for medical assistance with respect to their pregnancies at the Nassau County Medical Center pursuant to Title 11 of New York Social Welfare Law."

Petitioners cite *Abele*, et al. v. *Markle*, et al., 452 F.2d 1121 (2nd Cir. 1971) as authority (Pet. Br. at 81), but the same is totally inapplicable, inasmuch as no women plaintiffs were pregnant at the time of filing that suit.

"Accordingly we hold that non-pregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, and we affirm the district court's dismissal of the complaint as to plaintiffs claiming standing solely on the basis of their childbearing age." 452 F.2d at 1125.

Similarly, *Crossen*, et al. v. *Breckenridge*, et al., 446 F.2d 833 (6th Cir. 1971) is cited by Petitioners as authority for their claim. (Pet. Br. at 82). In fact, a close reading of the related *Crossen* cases demonstrates the absolute correctness of Respondents' position.

"The case was filed by the plaintiffs on May 13, 1970. . . . The plaintiffs, an obstetrician, a minister, a pregnant

woman (Craddock), a woman having the capacity to become pregnant and a women's liberation group, each claimed standing to attack the statute." (Parenthetical material supplied). *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587, 588-589 (E.D.Ky. 1972), *vacated and remanded*, 410 U.S. 950 1973).

Crossen, supra, had originally been dismissed for lack of standing on October 7, 1970 (344 F.Supp. at 589), some 147 days after filing. On June 23, 1971, some 406 days after filing, the Sixth Circuit Court of Appeals reversed and held,

> "At the commencement of the action appellant Craddock was pregnant and had allegedly been denied an abortion . . . On these facts we find that appellant Craddock has standing . . .
>
> . . .
>
> "Appellant Pozzuto, on behalf of herself and all other similarly situated married women, alleges that she is not pregnant but may desire to terminate future pregnancies and would be unable to obtain a medical abortion . . . we hold that appellant Pozzuto does not have standing . . ." *Crossen*, et al. v. *Breckenridge*, et al., 446 F.2d 833, 839 (6th Cir. 1971).

On May 19, 1972, some two years and six days after filing of suit, the District Court ruled on the merits of the plaintiffs' claims, including plaintiff Craddock who had been pregnant at the initial filing of said cause. *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587 (E.D. Ky. 1972), *vacated and remanded on other grounds*, 410 U.S. 950 (1973).

The First Circuit Court of Appeals has also held that termination of pregnancy during pendency of district court proceedings

does not render the cause moot, even though plaintiffs aborted immediately after filing suit and before trial.

> "First, defendant says that he has a probability of succeeding on the merits because plaintiffs' case is moot due to the fact that after its commencement plaintiffs voluntarily obtained abortions in New York. The fact that a plaintiff had other available relief does not moot the case. Hathaway v. Worcester City Hospital, 1 Cir., 1973, 475 F.2d 701, and defendant does not so claim. Nor, of course, does defendant dispute the basic *Roe* rule that the necessarily short duration of a pregnancy does not, in normal circumstances, create mootness when pregnancy ceases.
>
> . . .
>
> "We consider that defendant's claim of mootness is a will-o'-the wisp and assumes the very question at issue. If a plaintiff has a right to terminate her pregnancy—which is the legal question before us—the sooner she succeeds in doing so, the better. We have in mind the trimester trilogy, on which defendant relies in another connection, and its effect on viability and the pregnant plaintiff's health. *See* Roe v. Wade, 410 U.S. at 149-150, 93 S.Ct. at 725. It seems not only illogical but, to use a polite word, harsh, to argue that in order to establish her right to an abortion a woman must decline to have it." *Doe*, et al. v. *Israel*, etc., 482 F.2d 156, 158 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

The position of Petitioners may be likened to the historical practice of proving one's innocence of witchcraft by drowning.

In *Doe*, et al. v. *Bolton*, etc., et al., 319 F.Supp. 1048 (N.D. Ga. 1970), decided July 31, 1970, plaintiff Doe would have been 24 weeks pregnant when the District Court finally ruled. *Doe, supra*, 410 U.S. at 185.

The District Court below noted that Respondent Doe terminated her pregnancy prior to service on Petitioner Wochner. Diligent service was attempted but the named defendant was out of town. The date of service, if diligent, has never been held a critical time under federal law in various considerations; but, instead, the filing of the action is the relevant consideration of timeliness.[79] Federal Rule of Civil Procedure No. 3 specifically provides, "A civil action is commenced by filing a complaint with the court".

The language of *Roe, supra,* and *Doe, supra,* as to standing in pregnancy cases is not strictly applicable to only the appellate process. No logical reason exists to so narrowly interpret it nor does reason support such an interpretation. A close reading belies such a meaning or intent. The language is equally applicable to all stages of litigation. To hold otherwise would institute an arbitrary distinction and subject pregnant plaintiffs to the capricious whims, delays and dilatoriness of courts and opposing counsel. It should be noted that Respondent Doe was 12 weeks pregnant at time of filing, would have been 19 weeks pregnant at time of filing for summary judgment on October 5, 1973 and *would have been 39 weeks pregnant and past her expected date of delivery when the District Court below first learned of her non-pregnant status; having failed in the interim to decide or rule on her motion for summary judgment.*

As so aptly noted in *Roe, supra,* a normal pregnancy is "266-days" 38 weeks (410 U.S. at 125) and even more critically, "the risk to the woman increases as her pregnancy continues". (410 U.S. at 150).

How much risk should pregnant plaintiffs be judicially required to endure? How much risk is too much risk? Should

---

[79] See: *The Moore Company of Sikeston, Missouri,* et al. v. *Sid Richardson Carbon & Gasoline Company,* 347 F.2d 921 (8th Cir. 1965); and *United States* v. *Wahl,* et al., 406 F.Supp. 1396 (E.D. Mich. 1976).

pregnant plaintiffs be required, in order to assure their standing, to assume the ever increasing rates of morbidity and mortality until the date of service on defendants, until defendants file motions, until defendants file an answer, until date of trial, until date of court judgment or until some other as equally arbitrary, indefinite and undeterminable period of time? As this Honorable Court noted, it is only during the first trimester that "(m)ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." (*Roe, supra,* 410 U.S. at 149). The action of the District Court placed Respondent Doe, and all potential similar plaintiffs between the Scylla of being foreclosed an abortion through the dismissal of her suit and the Charybdis of retaining her standing, at the peril of increased jeopardy to her life.

Most recently, this Honorable Court in *Planned Parenthood of Central Missouri,* et al. v. *Danforth,* etc., et al., — U.S. — (1976) reviewed the law in the area of standing and held as to abortion cases,

> "A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.' *Roe* v. *Wade,* 410 U.S. at 124-125."[80]

This can be no serious question of Respondent Doe's standing on her behalf and on behalf of her recognized class.[81]

Petitioners have not cited a single case in which plaintiffs were held not to have standing when pregnant at time of filing.

---

[80] See: *Franks,* et al. v. *Bowman Transportation Company, Inc.,* et al., — U.S. — (1976); *Doe* v. *Mundy,* etc., et al., 514 F.2d 1179, 1181 (1975).

[81] In the present case, see: 497 F.2d at 1063; 515 F.2d at 545; and 527 F.2d at 605.

Cases denying standing to women on the basis of only a possible future pregnancy are not analogous nor of the slightest precedential value.

CONCLUSION

The number of pregnant, indigent women in the City of St. Louis, Missouri, who have been irreparably damaged through the denial to them of their fundamental constitutional rights by the arbitrary actions of Petitioners, is staggering. The principles upheld by the Appellate Court in its two prior decisions of this cause have been firmly and unanimously established by all federal courts ruling upon the identical issues. Petitioners have cited not a single case to the contrary.

Petitioners should not be allowed through emotionally laden hysterics nor ill-founded and unmeritorious legal claims to escape the full and fair impact of the Appellate Court's judgments.

At a press conference on October 10, 1975, seven months following the appellate decision on the merits, Petitioner Wochner admitted that to that date not a single abortion had yet been performed, despite the fact that the number of patient inquiries had been 450% above his recent estimate as to the expected demand.

While it is true that the policies of Petitioners have not totally foreclosed abortions for women of low and marginal incomes, the effect upon their access to services has been devastating. For no reasons other than Petitioners' hospital policies they have been denied equal protection in the making of a constitutionally protected choice. They have suffered the cruel coercion of financial support to choose carrying to term, although against their desires and against in many cases their best interests of life and health. To ignore the economic bait forces

them to rely upon the charity and beneficence of the private medical sector for assistance, a degrading alternative.

To deny indigent women the same rights of access to control over their own reproduction, fosters a perpetuation of the poverty cycle, generation after generation, and restricts their escape and rise from the conditions of their environs.

The Court of Appeals, in describing this situation, created and perpetrated by Petitioner, as "arbitrary", "callous" and "oppressive", was none too strong in its use of language.

Accordingly, Respondents respectfully pray that the judgments of the United States Court of Appeals in this cause be affirmed and all costs herein taxed against Petitioners.

Respectfully submitted,

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents

Certificate of Service

I, the undersigned attorney for Respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true, correct and sufficient copies of the foregoing "Brief for Respondents", upon each party required to be so served, by depositing said copies in a United States Postal Serv-

ice mail box, with first class postage prepaid and affixed, addressed to Mr. Jack L. Koehr and to Mr. Eugene P. Freeman, Office of the City Counselor of the City of St. Louis, Missouri, 1200 Market Street, St. Louis, Missouri 63103, attorneys for Petitioners.

Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300